

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: CITY OF DETROIT, . Docket No. 13-53846
MICHIGAN, .
 . Detroit, Michigan
 . October 15, 2013
Debtor. . 10:00 a.m.

HEARING RE. OBJECTIONS TO ELIGIBILITY TO CHAPTER 9 PETITION
BEFORE THE HONORABLE STEVEN W. RHODES
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE CLERK: All rise. Court is in session. Please
2 be seated. Case Number 13-53846, City of Detroit, Michigan.

3 THE COURT: Good morning, everybody. I'd like to
4 take appearances from the attorneys who will be speaking here
5 today first. Can we do that?

6 MR. BENNETT: Thank you, your Honor. Bruce Bennett,
7 Jones Day, on behalf of the city.

8 MS. NELSON: Good morning, your Honor. Assistant
9 Attorney General Margaret A. Nelson on behalf of the State of
10 Michigan.

11 MS. LEVINE: Good morning, your Honor. Sharon
12 Levine, Lowenstein Sandler, for AFSCME.

13 MR. GORDON: Good morning, your Honor. Robert
14 Gordon of Clark Hill on behalf of the Detroit Retirement
15 Systems.

16 MR. MONTGOMERY: Good morning, your Honor. Claude
17 Montgomery, Dentons U.S., for the Official Committee of
18 Retirees.

19 MS. CECCOTTI: Good morning, your Honor. Babette
20 Ceccotti, Cohen, Weiss & Simon, LLP, for the UAW.

21 MR. WERTHEIMER: Good morning, your Honor. William
22 Wertheimer on behalf of the Flowers plaintiffs.

23 MS. PATEK: Good morning, your Honor. Barbara Patek
24 of Erman, Teicher, Miller, Zucker & Friedman on behalf of the
25 Detroit Public Safety Unions.

1 MS. CRITTENDON: Good morning, your Honor. Krystal
2 Crittendon, interested party.

3 MS. BRIMER: Good morning, your Honor. Lynn M.
4 Brimer appearing on behalf of the Retired Detroit Police
5 Members Association.

6 MR. MORRIS: Good morning, your Honor. Thomas
7 Morris of Silverman & Morris on behalf of the Retiree
8 Association parties.

9 MR. GOLDBERG: Good morning, your Honor. Jerome
10 Goldberg on behalf of interested party David Sole.

11 MR. TROY: Good morning, your Honor. Matthew Troy,
12 Department of Justice, Civil Division, on behalf of the
13 United States. It is not my intention to speak this morning,
14 your Honor, unless you have specific questions regarding our
15 filing from Friday.

16 THE COURT: Thank you, sir. Mr. Gordon.

17 MR. GORDON: Thank you, your Honor. I just wanted
18 to provide the introduction relative to our proposed
19 allocation of the time and order of presentation here this
20 morning. As your Honor can see from the document that was
21 filed, there are 11 objectors who wish to speak, and, of
22 course, they all have important points to make, but -- and we
23 very much appreciate the cooperation amongst all of them. It
24 was a good and constructive process. Not only was that easy,
25 but everyone has been very cooperative, and we've allocated

1 the time accordingly to various parties to have the
2 opportunity to speak today.

3 You will note, your Honor, a couple things. One, we
4 did not allocate the full 120 minutes in the morning.
5 There's a few minutes left over. Similarly, in the afternoon
6 there's about five minutes left over of the 90 minutes.
7 That, of course, is not intended to necessarily waive our
8 opportunity to have the full time, but we thought that would
9 build in some flexibility and some error margin as people
10 stand up and sit down to make sure that we fit within the
11 time frame.

12 Also, as footnote one indicates, the presentation
13 order does not necessarily tie -- correspond discretely with
14 each of the issues as listed in your scheduling order, your
15 Honor. There is some correlation, but various parties, as
16 the Court, I'm sure, can understand, have a number of issues
17 that they would like to address. There will be some overlap.
18 The parties are going to try to overlap as little as
19 possible, but it was not really feasible to try to identify
20 discrete issues that each party was going to take on, so
21 instead the hope is that as each party comes to the podium,
22 they'll try to give you a little bit of a road map as to the
23 particular issues that they're going to touch upon.

24 THE COURT: Thank you, and thank you for your
25 extraordinary effort in coordinating this. I'm sure it was a

1 challenge. And I also want to thank all of the attorneys for
2 cooperating with Mr. Gordon and with the Court in trying to
3 organize this as best we can. So we're going to start then
4 with AFSCME's counsel, and we're going to try to run the
5 timing mechanism for your convenience. Kelli, have we got
6 that available? I'm sorry.

7 MS. LEVINE: They were teasing me that if I'm
8 nervous, it'll take 20 minutes, but if I remember to speak
9 slowly, it'll take 35.

10 THE COURT: Okay. So for 35 minutes you may
11 proceed.

12 MS. LEVINE: Thank you, your Honor. First, we
13 appreciate the opportunity. We think these issues are
14 extremely important, and we're glad that we have the
15 opportunity to speak. Second, as Mr. Gordon correctly noted,
16 the parties who are speaking here today have made a concerted
17 effort to divide up the time and to try not to duplicate our
18 comments, so in that regard we're reserving the right to rely
19 on the filed objections along with the other arguments of
20 other counsel simply because we won't have time to do it all
21 ourselves.

22 With that, your Honor, we started this endeavor by
23 looking at PA 436 specifically concerned, as you might
24 imagine, with the pension issues and with the fact that we
25 believe that the Michigan Constitution provides for

1 protections for vested pension benefits, and then that
2 potentially conflicted with PA 436, and, therefore, we
3 started looking at the issue of whether PA 436 was, in
4 fact -- was, in fact, unconstitutional in that it allowed a
5 Chapter 9 filing in light of the pensions -- in light of the
6 pension restriction in the Constitution.

7 In addition to that, we were looking at the
8 governor's authorization in allowing the Chapter 9 filing in
9 light of PA 436 and in light of the Michigan Constitution and
10 grappling with the issue of whether or not that authorization
11 without any contingencies caused this Chapter 9 filing to be
12 unconstitutional as applied.

13 In addition to that, we grappled with the ripeness
14 issue as to whether or not all of these issues should be
15 raised now or whether they should be raised in connection
16 with a plan of adjustment, specifically, your Honor,
17 grappling with the issue as it was presented to us by our
18 members where we have folks literally sitting at their
19 kitchen table deciding whether or not they can take medicine
20 today or do they have to start taking it every other day, do
21 they feed themselves, do they feed their children, do they
22 pay rent, so we came to this Court anxious to have some of
23 these issues decided quickly.

24 On top of that, as it turns out, involved in the
25 mediations and the other efforts with regard to the serious

1 issues that are confronting Detroit, we do think
2 understanding your Honor's views of the rules of the game
3 could be useful for the parties in that process, but that's
4 really by way of introduction because what we've done, your
5 Honor, in addition to that, is we started researching how we
6 thought PA 436 fit in the overall scheme of Chapter 9 and, in
7 looking at those issues, delving into whether or not Chapter
8 9 itself was, in fact, unconstitutional, which is what we
9 will address before your Honor this morning. And I'd like
10 to, with the Court's permission, set the table a little bit
11 but promise to get into Bekins and some of the cases that are
12 cited by folks who disagree with our views later on in the
13 comments.

14 So I'd ask you, your Honor, to come back with me, if
15 you will, to elementary and high school when we first started
16 talking about what the Constitution is and what it means,
17 and, respectfully, when we go back, we remember that the
18 framers of the Constitution were fleeing an oppressive,
19 overbearing, centralized government. So when we started
20 looking at how we framed our Constitution, we were very
21 careful to make sure that there was a federal Constitution
22 that was extremely limited only to specific rights that we
23 believed should transcend every single state in the union,
24 and we've come to call those the unalienable rights, and they
25 refer to things like freedom of speech and freedom of

1 religion. And under the Tenth Amendment, your Honor,
2 everything else is reserved for the states, so specifically
3 reserved for the states are the state municipal governments'
4 rights to handle their own financial management. And this is
5 done, your Honor, not to protect the states, which would have
6 been as suggested by the New Jersey plan, but was actually
7 done to protect the individual citizens, as suggested by the
8 Virginia plan, and the specific rationale behind protecting
9 the individual citizens was in order to have accountability
10 from our government and particularly, more importantly, from
11 our local governments, which were viewed as being more
12 accessible to the citizens that they were -- that they were
13 supposed to be taking care of. So, for example, if somebody
14 infringes on my right of free speech or my right of freedom
15 of religion, I know I point my finger to D.C., and I look at
16 the federal government, and I say to the federal government,
17 who is accountable for those federally protected rights,
18 "Make them stop," but if somebody says to me that there's an
19 inappropriate use of the power over the financial management
20 of a state municipality, of, for example, Detroit, I look to
21 my local government. I look to my local politicians and my
22 local leaders, and I say, "I'm holding you accountable," and
23 we saw that working well very recently with the mayor of
24 Detroit -- with the prior -- apologies -- prior mayor of
25 Detroit, so this direct accountability, which is a

1 cornerstone of how we -- of how we run our country and how we
2 run this democracy, is there for a reason, and it's not there
3 to protect the states. It's there to protect the citizens.
4 The Constitution doesn't start "We the states." It doesn't
5 say, "I the general federal government." It starts, "We the
6 People." So now, as we indicated in our brief, we believe
7 there is what we've called this unholy alliance between the
8 state giving authorization to the federal government to run
9 this Chapter 9 process. And what we said there, your Honor,
10 is that the states are, in essence, ceding the responsibility
11 and the accountability for their own financial management, so
12 by turning over under Chapter 9 to the federal government and
13 being able to hide behind the bankruptcy process and this
14 Court, we lose that accountability that's a cornerstone of
15 what our Constitution requires of us, and we've seen that
16 already. We saw that debtor's counsel correctly noted in an
17 internal e-mail exchange back in January of 2013 that making
18 this a federal issue provides political cover, and we've seen
19 it in the depositions where we're talking to the EM and the
20 governor, and they are talking about the fact that they're
21 not exactly sure what's going to happen with the pensions.
22 The bankruptcy process takes care of that. And we would
23 respectfully submit, your Honor, that we're seeing play out
24 in real time and real life the exact loss of accountability
25 that the Constitution was designed to protect, so --

1 THE COURT: Well, but hasn't state consent been a
2 cornerstone of the Supreme Court's Tenth Amendment
3 jurisprudence?

4 MS. LEVINE: Your Honor, we'll talk about the
5 consent in Bekins, and we don't believe that what we're
6 saying here today is inconsistent with state consent. And if
7 your Honor will give me a little bit more leeway, we'll reach
8 that point --

9 THE COURT: Sure.

10 MS. LEVINE: -- because we understand the issue. So
11 one of the comments that's being made is that in order for
12 there to be -- that the reason why we can't do it at the
13 state level, the reason why the state municipal governments
14 can't do it is because it violates the contract clause, and
15 by violating the contract clause, you can't do a plan of
16 adjustment unless you have a hundred percent consent.

17 Now, we would respectfully submit, your Honor, that
18 there's two responses to that, and they are -- and I'll admit
19 they're diametrically opposed, but under either response you
20 don't get to the place where you get to take it away from the
21 states. Number one, if you believe, as suggested, that you
22 need a hundred percent consent at the state level because of
23 the contract clause, then we would respectfully submit that
24 the states can't cede control to the federal government and
25 then suddenly it becomes legal to do a plan of adjustment

1 without a hundred percent consent. And, your Honor, in doing
2 that, we're actually just reading from the Constitution
3 itself. The contract clause is in Section 10 of Article I of
4 the Constitution. Section 10, Article I, of the Constitution
5 has three subsections, one, two, and three. In the first
6 section, it talks about no state shall enter into treaties
7 with foreign countries, print money, and it's the contract
8 clause. Under sections two and three, not where the contract
9 clause sits, it says, "No State shall without the consent of
10 Congress," so by the plain reading of the Constitution, if
11 "no state shall" means no state shall, then no state shall do
12 it with or without the consent of Congress, and the framers
13 clearly understood that if they wanted the states to be able
14 to do it with the consent of Congress, they could have done
15 what they did in the two other subsections and basically
16 said, okay, instead we'll do it -- we'll do it with a federal
17 municipal bankruptcy statute where the federal government
18 will consent, and, therefore, you can violate the contract
19 clause. So our first point is under the contract clause, "no
20 state shall" means no state shall, and if we're going to be
21 intellectually honest with ourselves, that applies regardless
22 of whether or not Congress consents because it's not, as in
23 Section 10, the second and the third paragraph, "No State
24 shall without the consent of Congress."

25 THE COURT: What Supreme Court case law supports

1 this interpretation?

2 MS. LEVINE: Your Honor, we respectfully submit that
3 it's Ashton.

4 THE COURT: The case that Bekins overruled?

5 MS. LEVINE: Well, we don't believe that Bekins
6 overruled it, and if I can keep going, the alternative
7 approach -- and, frankly, the plain meaning of the statute we
8 don't believe yet -- or I'll admit we haven't found yet a
9 constitutional case that comes right out and says it is or it
10 isn't done this way, but it is the plain reading of the
11 Constitution, which we thought was --

12 THE COURT: Okay.

13 MS. LEVINE: -- a good place to start. But moving
14 past that, let's assume -- and we believe the better answer
15 is that there has to be a way to adjust debts. Then we go
16 back to where we started, your Honor, which is this is
17 absolutely a state municipal right. What Bekins was looking
18 at -- and remember Bekins was decided in -- right in the
19 middle of the Great Depression. Okay. And so up until
20 the -- up until just before Bekins was decided, there was no
21 municipal federal bankruptcy law at all. It wasn't really
22 contemplated by the framers, and I'll get into that a little
23 bit more in a minute, but what Bekins found was we now have
24 this new federal municipal bankruptcy law. There is no state
25 counterpart, so the only option that's available to the state

1 and the only way that the state can be accountable to its
2 citizens to fix this problem if there is no other option
3 available is to then consent to the federal court stepping in
4 and doing this. Consistent with that, your Honor, we
5 believe, is Asbury Park, and we would respectfully submit
6 that Asbury Park was decided after Bekins. It was decided --
7 it wasn't a unanimous decision, but there was only one
8 concurrence, so there was no dissent. It was drafted by
9 Judge Frankfurter, hardly, you know, a slouch, and it
10 specifically upheld Bekins but further found that a state --
11 in that case, New Jersey -- could correctly under its state
12 municipal authority do a plan of adjustment that did not
13 require 100 percent of consent, and in dealing with this
14 issue, it found that to be consistent with Bekins because
15 Bekins was looking at a situation where there was no state
16 alternative for the state to choose, and the state only had
17 one alternative, and it made the alternative to rely on the
18 federal statute. And it further found -- and I'm going to
19 quote just for a moment, Judge, but in dealing with this
20 issue, the Court posed and then answered this very question.
21 "Can it be that a power that was not recognized until 1938,"
22 which is a federal municipal bankruptcy law, "when so
23 recognized, was carefully circumscribed to reserve full
24 freedom" -- that's how Bekins interprets it -- "to the States
25 has now been completely absorbed by the Federal Government -

1 that a State which, as in the case of New Jersey, has after
2 long study devised elaborate machinery for the autonomous
3 regulation of problems as peculiarly local as the fiscal
4 management of its own household, is powerless in this field?
5 We think not." And we think that's very telling, your Honor.
6 And by the way, Asbury Park is still good law. Like Bekins,
7 which it is consistent with, it has not been overruled, so
8 the -- then we were grappling with, well, why hasn't anybody
9 looked at this issue. What happened after Asbury Park was
10 that the Bankruptcy Act incorporated a federal municipal
11 bankruptcy statute, which is a predecessor to 903, which
12 specifically includes a provision that provides, like 903,
13 that no state can enter into a plan of adjustment unless
14 there is a hundred percent consent. We find that interesting
15 that it's the federal statute. Basically, that's Article --
16 that's Chapter 9 saying Chapter 9 is constitutional, and the
17 states can't enter into an alternate separate plan of
18 adjustment with less than a hundred percent because Chapter 9
19 says so. It's a circular argument, we would submit, your
20 Honor, that can't possibly be the reason why the states can't
21 enter into a plan of adjustment, especially in light of
22 Asbury Park, with less than a hundred percent consent.

23 In addition to that, the other telling conclusion in
24 Asbury Park was when they addressed head on the issue of the
25 contract clause, they determined that the contract clause is

1 not violated when you don't actually violate the underlying
2 contract. They were analogizing it to like the property
3 rights, so while you have a contract right and that can't go
4 away or you have a property right and that can't go away,
5 what they were talking about in Asbury Park was what's the
6 remedy, and the remedy in a Chapter 9 -- and we would
7 respectfully submit the remedy in a state -- appropriate
8 state plan of adjustment is to take what is now a valueless
9 right -- contract right because the state municipality is
10 insolvent and create a plan of adjustment that, like in the
11 corporate bankruptcy setting, creates value for a right that
12 had no value. We're not doing away with the contract, and a
13 lot of the cases that come after that -- for example, United
14 Trust that talks about taking away the bonds or changing the
15 bonds -- Asbury Park says you're not taking away the
16 contract, you're not taking away the bonds, you're not taking
17 away our retiree benefits. All you're doing is you're
18 saying, "Look, there's not enough money here to pay for it.
19 We can't get it through taxation. We need to -- we need to
20 fashion a remedy." And that, your Honor, we would
21 respectfully submit is consistent with Bekins, with Asbury
22 Park, and with an appropriate reading of the contract clause.

23 Turning now to the bankruptcy clause, there is a --
24 there is a provision that provides for a national bankruptcy
25 statute. How can Chapter 9 be unconstitutional if we have

1 a -- if we have a bankruptcy clause that says there's a
2 national uniform bankruptcy statute? Number one, we're
3 directing our comments specifically at Chapter 9. We're not
4 saying there is no statute that could be -- that could fit
5 within the parameters. But that said, one of the things we
6 would observe about the bankruptcy clause is when the framers
7 framed the Constitution, it was inconceivable to them that
8 there would be a national municipal bankruptcy law. To this
9 day there is no national municipal bankruptcy law in the EU.
10 And while Chapter 11 provides a very viable way to enable
11 commerce and Chapter 7 provides a very viable way for there
12 to be a fresh start -- and we've avoided debtor's prison and
13 all of the things that the framers were focused on at the
14 time -- there was no -- and there wasn't until the Great
15 Depression a national municipal bankruptcy law.

16 Second, we think there's a problem with Chapter 9
17 specifically because the requirement of the national
18 bankruptcy law is that it be uniform, so whether I'm here in
19 Detroit or in any other state or city in the country, I know
20 what the -- I know what the criteria is to be a corporate
21 debtor. It's right in the Code. I know what the criteria is
22 to be a Chapter 7 debtor. It's right in the Code. But
23 because Chapter 9 is struggling with the difference of the
24 separation of what's a federal power and what's a state
25 power -- and we respectfully submit struggling in a way that

1 didn't work -- Chapter 9 is not a uniform statute. There are
2 some states that have objective standards so that everybody
3 in their particular state has to meet a certain criteria in
4 order to be a Chapter 9 debtor. There are some states that
5 don't even have the ability to be a Chapter 9 debtor, and
6 then there are some states, like Michigan, where even though
7 there's a statute that purports to authorize Chapter 9
8 filings, it is completely and totally subjective with regard
9 to who qualifies, whether they get authorization to file, and
10 whether or not there are any contingencies that are attached
11 to what they do when they're in that filing.

12 THE COURT: Okay. So how do you distinguish the
13 cases that uphold the nonuniformity of exemptions in Chapter
14 7?

15 MS. LEVINE: Your Honor, one of the -- two responses
16 to that. First of all, we understand the case law that says
17 that you can have conformity in a geographic location, so we
18 understand, for example, that if every state had an objective
19 standard the way every state has its own exemptions in
20 Chapter 7, that that could meet the criteria for uniform
21 standards, but we're saying something different. In Chapter
22 9 we don't know that every state has a standard or that
23 they -- and if they don't have a -- and if they don't have a
24 standard for becoming a Chapter 9 debtor, there is no default
25 back to that which is provided under the Code. In other

1 words, in Chapter 7, if I like Detroit's exemptions, I use
2 Detroit's exemptions. If I like the federal exemptions, I
3 use the federal exemptions. But there is no place where I
4 don't get to be a debtor or I don't get exemptions.

5 THE COURT: Well, but still the question remains how
6 does a nonuniformity among states in authorizing or not
7 authorizing Chapter 9 or in having different standards for
8 seeking Chapter 9 protection make the federal law nonuniform?

9 MS. LEVINE: Well, your Honor, if you take that to
10 its natural conclusion, you can say that I have a federal law
11 that basically says you can do whatever you want, but because
12 I'm saying you can do whatever you want to everybody, it's
13 uniform. We would respectfully submit that that doesn't --

14 THE COURT: Isn't that just about what the Chapter 7
15 exemption cases say? Beyond that, federal law outside of
16 Chapter 9 applies state property law, generally speaking,
17 and, of course, the property law differs from state to state
18 to state.

19 MS. LEVINE: Yes. And that goes back to the line of
20 cases that talk about geographic, that they can be -- that
21 they can be uniform within a geographic area. The difference
22 between all of those cases -- and then I'll let the point
23 rest because you are the Judge, and we may have to agree to
24 disagree --

25 THE COURT: I'm just asking questions.

1 MS. LEVINE: But the -- but we view that, as I said
2 earlier, that those exemptions, those criteria are published.
3 Okay. So even if I know that I'm not going to follow -- that
4 if I'm going to follow state law with regard to UCC
5 priorities or if I'm going to follow state law with regard to
6 exemptions, in a specific geographic area I know exactly what
7 that is. In the states that have the subjective test with
8 regard to whether or not to file a Chapter 9, Detroit has a
9 different standard than Lansing and has a different standard
10 than other cities, and that's the issue, and the issue -- and
11 not only that, but none of those cities know what that
12 standard is. And I'll leave it there.

13 THE COURT: Okay.

14 MS. LEVINE: Your Honor, the other argument that's
15 out there is, well, doesn't the state have -- doesn't the
16 state have the ability to cede control if there's federal
17 aid. Your Honor, we would respectfully submit that's a very
18 different situation. If you're looking at a situation, for
19 example, like Sandy or like Katrina where the federal
20 government is saying we're going to give you money under
21 specific terms and conditions, that's different. Nobody is
22 saying to Detroit or nobody is saying to every single Chapter
23 9 debtor if you file Chapter 9, you get "X" amount of money
24 from the United States of America, and in exchange for that,
25 you have to follow these certain rules. There's a difference

1 between entering into a contract for money and for support
2 than ceding control just to do the plan of adjustment with no
3 financial support.

4 THE COURT: Well, but the cases in which the Supreme
5 Court has held the Tenth Amendment is violated by the federal
6 government or the federal government's legislation involve
7 what's called commandeering. Is there any of that here?

8 MS. LEVINE: Well, your Honor, we think that's -- we
9 think that is, in part, what is happening here. The
10 commandeering is they're taking away the state's right or
11 the -- to do their own financial management.

12 THE COURT: But only because the state showed up.

13 MS. LEVINE: But that's not true, and this is where
14 we go back to the Bekins --

15 THE COURT: Is there anything in Chapter 9 that
16 compelled the state to authorize the city to file this case?

17 MS. LEVINE: Yes, and this is -- and this is where
18 the argument comes. Okay. In Bekins there was no state
19 alternative at all. In Asbury Park -- so, therefore, the
20 Bekins Supreme Court made the decision that the state had no
21 choice if it wanted to adjust its debt but to come to the --
22 but to come to the federal court. In Asbury Park there was a
23 state alternative to the federal statute that was -- and that
24 was permitted by both the federal statute and the state
25 statute, so the arguments outside of the federal statute that

1 said you can't go to federal -- you can't do it statewide,
2 you have to go to federal court under the commerce clause and
3 otherwise, were rejected for some of the reasons that we're
4 discussing here today. In Chapter 9 four year -- or the
5 predecessor to Chapter 9, four years after Asbury Park, the
6 Bankruptcy Code in its municipal statute said we can adjust
7 debts at the federal level if you use the Bankruptcy Act, now
8 the Bankruptcy Code, but you, states, cannot because of how
9 we read the commerce clause only -- state municipal
10 governments cannot adjust debt except with a hundred percent
11 consent, so what the -- so what Chapter 9 says to the
12 governor is if you want to do a plan of adjustment without a
13 hundred percent consent, you must come to the federal
14 government, number one. Number two, your Honor --

15 THE COURT: Well, but the commandeering cases
16 address situations where the state and -- the federal
17 government imposes on the state to carry out some federal
18 program, some federal policy. How does that work here? So,
19 for example, in the New York case, which involved the waste,
20 right, nuclear waste or whatever, the state was forced to
21 take title to it under certain circumstances, and the Court
22 held that the state couldn't be imposed upon to do that to
23 carry out the federal policy of how to dispose of this waste.
24 How is that analogous here?

25 MS. LEVINE: Well, your Honor, the reason why we

1 believe it's analogous is because in order to do a plan of
2 adjustment, arguably there's no other way to do that without
3 using Chapter 9 unless you have a hundred percent consent,
4 and that's the commandeering. The requirement that there be
5 a hundred percent consent unless you're the federal
6 government means that the state has no ability to do a plan
7 of adjustment unless it cedes control to the federal
8 government and to the bankruptcy process.

9 Your Honor, I'm coming up on time. If I -- unless
10 your Honor has more questions, if I could just close briefly.

11 THE COURT: Well, the other question I have for you
12 is what about the cases that hold that the lower courts are
13 to apply Supreme Court precedent until the Supreme Court
14 itself overrules it, and this is, of course, the Bekins case?

15 MS. LEVINE: Well, your Honor, our -- we would
16 respectfully submit that Asbury Park was decided after
17 Bekins. Right now where the Supreme Court sits is that
18 Bekins stands for the proposition that in the face of no
19 state alternative, which is what existed there, you can turn
20 to the federal statute. Asbury Park stands for the
21 proposition that side by side an appropriate municipal
22 bankruptcy law and an appropriate state law, that's where the
23 state gets to choose, and if the state, as it did in Asbury
24 Park, chooses an appropriate state law that does permit for
25 the adjustment of debt, then the state is accountable to its

1 citizens. If the state chooses the municipal law, then the
2 state is accountable to its citizens. But either way, it's a
3 true state decision. Consistent with both of those cases, we
4 find ourselves here in Detroit with a situation where there
5 is prohibited by Chapter 9, we believe unconstitutionally, no
6 ability to have that second state decision.

7 THE COURT: Just so I understand, your argument is
8 that the current Chapter 9 is different enough from Bekins
9 because of its exclusivity that Bekins is not binding on this
10 Court.

11 MS. LEVINE: Correct, and secondarily that Bekins
12 never reached the issue because regardless of whether or not
13 Bekins had an inappropriate -- the Bekins statute had an
14 inappropriate clause, the state wasn't looking to have a
15 separate -- you know, here we have PA 436 looking to try and
16 pigeonhole itself into the strictures of Chapter 9 reviewing
17 Chapter 9 as unconstitutional.

18 Your Honor, we believe your Honor is faced with a
19 difficult decision here. We understand that Detroit is --
20 all that's happening here is difficult. Detroit is in dire
21 financial straits, and it's not lost on any of us that the
22 decisions that you make with regard to the criteria for
23 eligibility, particularly with regard to Chapter 9, will have
24 implications for blighted cities throughout the United
25 States. We also understand that constitutional issues are

1 difficult issues. We heard -- you know, we've been grappling
2 since 9/11, for example, with the balancing between homeland
3 security and individual privacy rights. We started talking
4 earlier about the First Amendment, and as a society we
5 grapple between where does First Amendment end and where does
6 a hate crime, for example, begin. This is no less an
7 important constitutional issue because of the impact this
8 will have on state sovereignty and the ability of its
9 citizens to hold its own municipal leaders accountable.

10 Your Honor spent a long time listening to a lot of
11 individual objectors here in this courtroom talk about how
12 bad they felt things were in Detroit trying to deal with the
13 fact that their firemen were using garden hoses, you know,
14 street lights are out, all of these things, and your Honor
15 was clearly sympathetic. And it was -- and concluded that
16 hearing, we believe correctly so, by saying that this was a
17 great day for democracy, but we would also add, your Honor,
18 that despite the fact that these things are at the forefront
19 of your mind and you want to do what's right, that doesn't
20 necessarily mean that you can do what's expeditious -- what's
21 expedient. Democracy is hard, and we would respectfully ask
22 that your Honor consider these issues with the same depth and
23 consideration that you've considered everything in this case
24 to date. Thank you.

25 THE COURT: Thank you. Mr. Montgomery also for 35

1 minutes.

2 MR. MONTGOMERY: Yes, sir. Thank you.

3 THE COURT: You may begin.

4 MR. MONTGOMERY: Good morning. Your Honor, my task
5 today is to discuss with you constitutionality as applied,
6 the standing and ripeness issue that the U.S. government has
7 posed to our constitutionality as applied to argument, and to
8 identify for you the predicate of that unconstitutionality as
9 applied, which, of course, we believe is the unconstitutional
10 behavior of Emergency Manager Orr and the governor in the
11 context of PA 436.

12 I'd like to set the stage briefly for you, your
13 Honor, on the question of standing by setting up two lines
14 of -- view of history here. One is that in 1963 the State of
15 Michigan amended its Constitution to protect the pensions of
16 municipal workers. Partly in reliance on that protection, a
17 small minority of the millions of people who have lived and
18 worked in the city went to work directly for the city. Of
19 those, thousands of people who worked, about 23,000 people
20 are alive today who are retirees of the City of Detroit,
21 their beneficiaries and surviving spouses.

22 Now, those 23,000 people have been, in our view,
23 stalked by the emergency manager, who, with the blessing and
24 support of his advisors, has proposed to eliminate pensions
25 through a Chapter 9 process. On July 16th the emergency

1 manager sought permission from the governor to file a Chapter
2 9. On July 18 the governor, with full knowledge of the plans
3 of his emergency manager, gave unconditional permission to
4 the emergency manager to file that Chapter 9 petition. And
5 the first overt harm has, in fact, now been announced. On
6 October 11, the city mailed its books to the retirees
7 announcing the termination of the retiree health insurance
8 program for those same 23,000 people.

9 Now, the committee that I represent, your Honor,
10 consists of nine individuals, including retirees, deferred
11 vested, retirement eligible, surviving spouses and
12 beneficiaries, all of whom are protected by the pension
13 clause, all of whom are adversely affected by the harm that
14 was just announced by the city. Each has or represents
15 vested accrued pension benefits, and they are participants in
16 the city's retirement health system.

17 The retiree committee consists of creditors
18 appointed by the U.S. Trustee to act in connection with the
19 case under 1102 and we think, therefore, have standing under
20 1109. Now, the 1109 standing of being an interested party
21 may not be sufficient for either standing or ripeness on a
22 constitutionality issue, but we say to you -- we ask your
23 Honor to look at the current situation in the following
24 analogy. When can somebody turn and defend themselves when
25 they are being threatened with harm? We think that you don't

1 actually have to wait until the harm has befallen you if the
2 threat is imminent, if the threat is capable of redress by
3 the Court, and it is identifiable. The redress by the Court
4 is, of course, denial of eligibility to the city. The threat
5 is loss of pensions as announced by the emergency manager.

6 THE COURT: Of course, if eligibility is denied, the
7 city is also denied its right to deal with all of its other
8 debts, isn't it?

9 MR. MONTGOMERY: Your Honor, that may be a temporary
10 delay because if your Honor holds that the current
11 authorization papers are not constitutional or if accepted,
12 despite their lack of constitutionality, the challenge to
13 Chapter 9 becomes insurmountable, we think that the
14 reasonable thing this Court could do if it were so inclined
15 would be to deny the city its eligibility for the reasons of
16 the challenge to the pension clause and then invite the city
17 to come back with either a conditional acceptance by the
18 governor or otherwise correct their manifest intent to
19 violate Article IX, Section 24.

20 THE COURT: Well, what do I do if in Detroit two, as
21 you propose, the bondholders come in waving the state
22 contracts clause?

23 MR. MONTGOMERY: Well, your Honor, first, we think
24 that there is a difference between Article IX, Section 24,
25 and both the federal contracts impairments clause and the

1 state's own contracts impairment clause. We think that can
2 be found in two places. First, there are extra words that
3 can be found in Article IX, Section 24. In its entirety,
4 Article IX, Section 24, has a phrase that appears at the end,
5 which says "shall not be diminished or impaired thereby," the
6 entire phrase, if I may, your Honor, "The accrued financial
7 benefits of each pension plan and retirement system of the
8 state and its political subdivisions shall be a contractual
9 obligation thereof which shall not be diminished or impaired
10 thereby," and, of course, your Honor, the second funding
11 clause, which is, "Financial benefits arising on account of
12 service rendered in each fiscal year shall be funded during
13 such year and such funding shall not be used for financing
14 unfunded accrued liabilities." Your Honor, that is, to my
15 mind, certainly textually quite different than the state's
16 own simple contract impairment clause, and we think
17 meaningfully it's different. What Section -- Article IX,
18 Section 24, does for -- in our view, your Honor, is tell the
19 state that no matter what you are doing, you cannot take a
20 step to adversely affect those accrued financial benefits,
21 and we cite, of course, the Seitz case, which is the judicial
22 probate case in which judges in the State of Michigan asked
23 for protection of their pensions, and the Michigan Supreme
24 Court agreed. We think it's also consistent with the
25 Musselman case, which the Michigan Supreme Court said that,

1 again, the funding of retirement benefits that were otherwise
2 protected or protectable had to be done, and the state could
3 not take any action to not do that. Now, of course, that's a
4 mandamus case in which the Court denied mandamus, but the
5 legal proposition was squarely stated.

6 We also think the advisory opinions that the Court
7 entered with respect to the tax exempt nature of retirement
8 benefits clearly show that the Michigan Supreme Court looks
9 to see if the state is doing something to impair the actual
10 benefit. And that particular advisory opinion dealing with
11 the tax exempt nature of retirement benefits, the Michigan
12 Supreme Court said, no, merely taxing you or removing the
13 special exemption is not an impairment of the financial
14 benefit itself, so we step back and we ask your Honor to say,
15 okay, is a plan proffered by the emergency manager with the
16 knowledge and support or blessing of the governor authorized
17 by a statute an unconstitutional series of events? Is the
18 emergency manager's action unconstitutional, is the
19 governor's action unconstitutional, or is the statute itself?
20 Knowing that there is a judicial predilection for the
21 narrowest possible reading of major problems, we submit to
22 you that your Honor can start with the emergency manager's
23 plan. Stop it. No eligibility if the emergency manager's
24 plan is to be put forward. If that isn't enough because the
25 governor authorized it, then you have to challenge the

1 governor.

2 THE COURT: Let me rewind the clock here just --

3 MR. MONTGOMERY: Sure.

4 THE COURT: -- a couple of minutes and ask you about
5 this nonimpairment provision in the Constitution. The
6 question we all are struggling with is what is the meaning,
7 the substantive meaning of that provision in the context of a
8 political subdivision that doesn't have the money to comply
9 with it? What's the meaning of it?

10 MR. MONTGOMERY: First, I think this might be a good
11 opportunity to agree with your Honor that impairment in the
12 classic sense is something the Bankruptcy Code, of course,
13 has dealt with for many years by saying the allocation of
14 assets is not all by itself impairment. I think we -- I
15 think it's fairly well established that just because a
16 creditor gets less than a hundred cents does not mean that
17 their contract is impaired. On the other hand --

18 THE COURT: I thought that's exactly what it meant.

19 MR. MONTGOMERY: That's if the state does it, but
20 that's not that the -- remember the -- it was not a taking of
21 property by the federal government to authorize the
22 Bankruptcy Code. It was --

23 THE COURT: Oh, if that's what you mean --

24 MR. MONTGOMERY: Yes.

25 THE COURT: Absolutely.

1 MR. MONTGOMERY: Totally.

2 THE COURT: Absolutely, sure.

3 MR. MONTGOMERY: But it is a taking of property if
4 the emergency manager says to its retirees, "I, either by
5 virtue of a plan I put in or otherwise, am taking your right
6 to receive pension benefits in the future," which is what he
7 is proposing. He is not merely proposing to alter the
8 funding system in violation of Article IX, Section 24. He is
9 proposing to actually eliminate or reduce already accrued
10 financial benefits.

11 THE COURT: Right, so what's -- how do we give
12 meaning to nonimpairment, as you propose is constitutionally
13 required, if the city doesn't have the money to pay? What
14 does it -- what's the meaning of that requirement?

15 MR. MONTGOMERY: Well, your Honor, I think that if
16 there is to be some allocation -- let's back up for half a
17 moment. Let us assume for the moment that, in fact, the city
18 has proposed to utilize all of its assets to deal with it, so
19 we're not talking about a situation in which the city has
20 capacity on its balance sheet or cash flows to deal with
21 something that it just refuses to do. We think that the
22 proper answer is not for the federal government to invite the
23 state to violate its own Constitution but to have the state
24 adjust its own laws, have the state, using its people, its
25 either constitutional ratification process or the state

1 through its legislative process create the system for
2 adjustments that Asbury Park tells us is still at least
3 viable. Putting that aside, whether or not Asbury Park is or
4 is not still --

5 THE COURT: Well, but hang on, Mr. Montgomery. If
6 the pension right is as inviolate as you say it is, the
7 legislature can't adjust the pensions either.

8 MR. MONTGOMERY: No, but it can adjust other
9 people's assets, other people's entitlements. It can make
10 the accommodations to its Constitution that may be required.
11 It has the capacity to levy. It has the capacity to change
12 property rights. The state legislature has those property --
13 and the only thing we are asking this Court to consider --

14 THE COURT: Well, let me ask this question then.

15 MR. MONTGOMERY: Yes, sir.

16 THE COURT: Is it your position that because of this
17 nonimpairment requirement in the Michigan Constitution, the
18 State of Michigan is a guarantor of retirees' pension rights?

19 MR. MONTGOMERY: We have not garnered nor do we
20 propose to express a view today whether or not the state is a
21 guarantor. What we are proposing to express a view today is
22 that no state actor can do something in violation of the
23 state Constitution and have that act be other than void ab
24 initio. And if those acts are void ab initio, the requisite
25 authorizations either don't exist or, if this Court has the

1 power to accept those authorizations notwithstanding their
2 unconstitutionality under Michigan law, then your Honor is
3 engaged not in aiding the sovereignty of the state, as
4 suggested was required by Bekins, but you are aiding -- you
5 are going in the direction of derogation of the sovereignty
6 of the state. And why do I say that? Because you are
7 telling the people of Michigan they can't control their own
8 Constitution, they can't control their own legislature, they
9 can't control their own executive officers, and we think that
10 is a pure Tenth Amendment problem.

11 You mentioned earlier in discussion with Ms. Levine
12 the commandeering issue. It is absolutely true, as you have
13 identified, that first states must act in aid, not in
14 derogation of sovereignty. That's the Bekins. Under Printz
15 they can't compel a state official to do something that is
16 otherwise the subject of a federal program. They can invite,
17 they can entice, but they can't commandeer. That's the
18 Printz -- that's the Brady Bill decision. And in the New
19 York versus United States case, which, again, your Honor
20 identified, you can't compel ownership of radioactive waste.
21 Again, you can create programs, you can create enticements,
22 you can create an exhaustive federal regulatory scheme that
23 keeps the states out of regulating the business, but here the
24 federal government can't, by virtue of the Tenth Amendment,
25 keep the states out of regulating the financial obligations

1 of its citizens. It can't keep the states out of the
2 business of deciding when their elected officials can or
3 cannot do something, and it is that issue that causes the as
4 applied problem as opposed to the facial and validity issues
5 that were raised by AFSCME in the arguments of Ms. Levine.
6 We think it --

7 THE COURT: I want to -- well, I want you to focus
8 on why the mere filing of this case resulted in an imminent
9 threat to the pension rights of the retirees of the city
10 because the filing itself didn't result in anyone's payments
11 being reduced; right?

12 MR. MONTGOMERY: Well, I will note for you they --
13 on the healthcare side, they apparently are.

14 THE COURT: Well, but that's not a result of the
15 Chapter 9.

16 MR. MONTGOMERY: Well, actually, I don't think that
17 could be done under state law because these are all
18 collectively bargained -- or mostly collectively bargained,
19 and to the extent they were collectively bargained,
20 they're --

21 THE COURT: Well, but with or without the Chapter 9,
22 Mr. Orr was free to do that or not under state law.

23 MR. MONTGOMERY: Or not under state law.

24 THE COURT: There's nothing about Chapter 9 that
25 impacts his decision to do that. He hasn't asked, at least

1 as far as I know, the Court's permission to do that.

2 MR. MONTGOMERY: No. As far as we know, he hasn't
3 asked either. So if I may answer the question, which, if I
4 understood it correctly, was why is the mere filing --

5 THE COURT: An imminent injury.

6 MR. MONTGOMERY: -- an imminent threat, first, I go
7 back to the factual predicate that I think underlays this,
8 that the mere threat of filing -- excuse me -- the mere
9 threat of a filing is not the harm all by itself, but it was
10 preceded by an announced plan, the June 14 proposal, and a
11 series of other events that the emergency manager undertook
12 and statements made, which evidenced -- evidenced -- a desire
13 to violate the state Constitution. Now, the only way in the
14 emergency manager's own mind that he can do that is if he has
15 access to the Bankruptcy Court because he believes it will
16 trump the state constitution with respect to pension
17 protections. Now, right or wrong, it is the -- it is the
18 threat that those pension benefits will be eliminated as part
19 of a plan, a series of steps of which have already been
20 undertaken, the most recent of which was the filing of the
21 Chapter 9 petition. The problem we face, at least in my
22 view, your Honor, is that the world that you face today for
23 deciding whether or not the emergency manager's actions are
24 or are not constitutional under Michigan law is different in
25 the eligibility context than we think you're going to be

1 faced with at a plan confirmation context. Once you're
2 inside the box of bankruptcy -- excuse me -- everyone,
3 putting aside whether -- how vigorously we will try to get
4 state law to say something different, but everyone seems to
5 suggest that the priority schemes and the allocation schemes
6 of the Bankruptcy Code preclude a contrary result that would
7 be allowable under state law.

8 THE COURT: Oh, but you're going to fight that.

9 MR. MONTGOMERY: But, your Honor, I've lost before,
10 and I might lose again. The issue of --

11 THE COURT: Well, but if you lose, it will be on
12 legal grounds.

13 MR. MONTGOMERY: But, your Honor, it will be. If we
14 are fighting this issue at the back end of the case and we
15 are arguing, as we will if we are required to, that
16 notwithstanding 109, that the emergency manager can't propose
17 a plan in good faith in which he violates his constitutional
18 rights for --

19 THE COURT: Constitutional obligations, yeah.

20 MR. MONTGOMERY: Constitutional obligations. I
21 apologize. For that to be a viable argument, in effect, you
22 have to rule today, your Honor, that it would be a violation
23 of his constitutional obligations because if it's not a
24 violation in the context of adhering to the Bankruptcy Code
25 provisions, which some cases say only provide with respect to

1 prospective obligations -- that is, a new pension plan would
2 be subject to the protections -- well, we're not talking
3 about a new pension plan, your Honor. We're talking about
4 one that's been around for 60 or 70 years now, and we're
5 talking about a retirement plan that has people who are a
6 hundred years old.

7 THE COURT: Suppose the plan is confirmable because
8 it results in the consent of those impaired after
9 negotiation.

10 MR. MONTGOMERY: Your Honor, if our understanding of
11 the law is correct, it's going to be very hard for a state
12 official to agree in good faith to propose a plan that
13 impairs financial benefits without a hundred percent of the
14 retirees consenting either under 109 or under state law, and
15 so the -- in order to get to the point where a less than 100-
16 percent majority of the retirees are accepting the plan, you
17 have to have decided that state law doesn't control the
18 exercise of those rights.

19 THE COURT: Suppose you or one of your objecting
20 colleagues decides to assert that the Michigan Constitution
21 requires the state to guarantee the federal -- the retirees'
22 pension.

23 MR. MONTGOMERY: Well, your Honor, the -- again, you
24 are asking for advisory hypotheticals here, but --

25 THE COURT: Well, but that's what looking at

1 ripeness is all about.

2 MR. MONTGOMERY: The issue will be then not whether
3 or not the bankruptcy process has harmed the retirees because
4 it will have -- if the state is a guarantor or arguably a
5 guarantor, it must be sued, query whether or not that lawsuit
6 can be brought in the Bankruptcy Court or some other place,
7 and, secondly, the -- under the Sittler case, I believe,
8 there is a question of whether or not there's a cause of
9 action for damages for unconstitutional behavior. There may
10 be a remedy, an injunction against unconstitutional behavior,
11 but the Michigan Supreme Court has not yet adopted a per se
12 rule that says if there is a violation of the state
13 Constitution --

14 THE COURT: Suppose the state agrees that the
15 Constitution obligates it to guarantee the city's pension
16 obligations.

17 MR. MONTGOMERY: Then the state will have remedied
18 the harm caused by the bankruptcy, your Honor, but the harm
19 was still being caused by the bankruptcy.

20 THE COURT: What harm?

21 MR. MONTGOMERY: The harm was the diminution of
22 pension benefits.

23 THE COURT: Well, but if the state backs it up,
24 there's no diminution.

25 MR. MONTGOMERY: Yeah. If, as part of a plan of

1 arrangement, the state backstops -- you're right, your
2 Honor -- then the -- this is like a situation --

3 THE COURT: Okay. Okay. If I'm right about that,
4 then why is the issue ripe now as opposed to then?

5 MR. MONTGOMERY: This is like the landlord case, if
6 I may, your Honor, in which the -- I think it's Bennett
7 versus City of San Jose, which, if I may, your Honor, since
8 we didn't brief this issue, I can give you the cite for, but
9 as I'm looking for the citation, I believe that case stands
10 for the proposition that a landlord need not await the actual
11 failure to collect more rent than he could under the new
12 ordinance. He's allowed to challenge the ordinance when it's
13 being passed. All right. We think this situation is very
14 similar to that. We have a situation in which the emergency
15 manager has undertaken an act, has sought the aid of this
16 Court, and the question is do we have to wait for this Court
17 to, in effect, put it to us before --

18 THE COURT: No, no. The question isn't that. The
19 question is do you have to wait for the emergency manager to
20 actually propose a plan that impairs pensions -- that's the
21 question -- and then object to that on constitutional
22 grounds.

23 MR. MONTGOMERY: In the Thomas More Law Center case,
24 your Honor, the -- which is the commerce clause challenge to
25 minimum coverage provisions under the Affordable Care Act,

1 three and a half years in advance, the Sixth Circuit found
2 standing because notwithstanding the fact that it was a long
3 way off and many things could occur, including Congress
4 changing the law, different rules being applied, that was
5 enough because there was nothing the party asserting the
6 claim had to do in order to become injured. Now, yes, there
7 were things that any member of the law center group could do
8 that could escape the harm, but the fact that they had to
9 undertake affirmative steps to escape the harm was enough.

10 Here the only thing we can do to escape the harm
11 which the emergency manager has announced he will undertake
12 is to escape, and the only way to escape is through the gates
13 that your Honor is standing at the door of. You are the
14 keeper of the protection for the retirees. You are the one
15 who can stop the emergency manager from doing what is
16 unconstitutional under Michigan law. And apparently, by the
17 way, both the state and the city are inviting you to rule on
18 constitutionality issues, you know. They are perfectly
19 comfortable with your going down that road, your Honor, and
20 notwithstanding our hesitancy --

21 THE COURT: Does that make an otherwise not ripe
22 issue ripe?

23 MR. MONTGOMERY: No, obviously not, your Honor, but
24 we do think that where there's -- where the voluntary
25 cessation by the city or the temporary cessation or the

1 temporary abandonment of its statements that, oh, we are
2 going to impair the pensions does not create a situation that
3 moots the controversy nor do we think it eliminates the
4 ripeness of the controversy because your Honor can still see
5 the identifiable harm and can still issue an order that
6 redresses that identifiable harm by telling the city it may
7 not enter the portals of your courtroom.

8 Now, your Honor, I think we have, in effect,
9 distinguished the Barnwell case, which is cited by, I
10 believe, the U.S. government, because that was an ad hoc
11 committee of citizens instead of an 1102 committee. Here
12 we're clearly creditors. Here 1109 grants us statutory
13 standing as parties of interest, and I think we have
14 indicated to you that the harm is factual, imminent, and you
15 are at the gates.

16 One other thing I might want to sort of identify in
17 this ripeness issue, why now as opposed to what, why later,
18 of course, your Honor is familiar with the City of Stockton
19 case, and we are not urging you to adopt that case obviously,
20 but it does suggest that once in Chapter 11, the State of
21 California couldn't decide which rules it was going to
22 follow.

23 THE COURT: Chapter 9?

24 MR. MONTGOMERY: Right, in Chapter 9, the same thing
25 your Honor might decide here; that is, once inside Chapter 9,

1 the city is not free to do whatever it wants to do except
2 with respect to its own property and its own future
3 governance. That you cannot touch in any way, shape, or
4 form, but that doesn't mean that you have to approve a plan
5 that violates what your Honor thinks are the rules of the
6 road. And it is that danger that you would be called upon to
7 make a ruling inconsistent with Michigan law at the back end
8 of the case that has us asking you at the front end of the
9 case to prevent the city from engaging in that dialogue.

10 Now, the -- I think worth making as a final, if you
11 will, point -- and, again, later this afternoon you will hear
12 a more fulsome discussion, I believe, on all of the issues
13 associated with PA 436, but I think the void ab initio issue
14 is important to our constitutionality position; that is, were
15 it not for the fact that under Michigan law an
16 unconstitutional act is considered void ab initio, we think
17 you might be able to go down the road of accepting the
18 authorization papers as having been legitimately delivered to
19 your Honor without fear of violating our view of how Chapter
20 9 would be unconstitutional as applied; that is, if Michigan
21 law did not regard unconstitutional acts as void ab initio,
22 then all you would be faced with is a remediable situation
23 rather than an absence of action or an absence of
24 authorization action. And with respect to the void ab initio
25 cases, we have cited those in our brief, your Honor, and we

1 think that you should accept as a truism, if you will, the
2 simple words actually uttered by Attorney General Schuette in
3 his paper that the city lacks authority under Michigan law to
4 propose a plan that diminishes accrued pension rights. It
5 similarly lacks power to consent to any proposed action that
6 would violate the Michigan Constitution. The proposed action
7 was the petition. The proposed action was the petition as
8 part of a plan to eliminate the pension rights induced -- the
9 emergency manager got the governor to say yes to an act that
10 was unquestionably contrary to the pension clause. As a void
11 ab initio act, that means that the legitimacy of the filing
12 is called into question, pure question of state law for your
13 Honor to rule upon, pure question of whether or not, in fact,
14 the city has obtained valid authorization papers -- pretty
15 hard to be valid if the underlying actions are void ab
16 initio, which is the norm under Michigan law, and we think,
17 therefore, your Honor has two ways to go down the path of
18 blocking eligibility independently of the factual disputes
19 under 109. One is to hold that it's unconstitutional, the
20 authorization was unconstitutional because it was part of a
21 scheme to eliminate the pension rights or to say even if it
22 wasn't void ab initio, the acceptance of those actions by
23 this Court raise a huge constitutional challenge under the
24 Tenth Amendment to Chapter 9 itself. Obviously the principle
25 of limiting federal constitutionality challenges would favor

1 finding that the narrower ground would be that the emergency
2 manager couldn't have filed his papers. And I think, your
3 Honor, just because I must, I just want to argue we are not
4 arguing -- we are not rearguing today all those issues which
5 we were in front of your Honor before several weeks ago about
6 Stern v. Marshall and whether or not the Court should do
7 that. We are in front of you. You have determined that you
8 have the power to decide issues of state and federal
9 constitutionality. We are asking you to exercise that power
10 and to preclude the city's eligibility.

11 THE COURT: So if you don't -- we have a little time
12 left. I have some more questions for you.

13 MR. MONTGOMERY: Sure. Happy to engage, your Honor.

14 THE COURT: One is sort of a procedural one. You
15 mentioned that you didn't brief the ripeness issue. Would
16 you like an opportunity to do that?

17 MR. MONTGOMERY: That would be fine, your Honor.

18 THE COURT: I'd leave it to your discretion.

19 MR. MONTGOMERY: Yes, yes.

20 THE COURT: How much time --

21 MR. MONTGOMERY: We'd be happy to do that, your
22 Honor.

23 THE COURT: How much time would you like?

24 MR. MONTGOMERY: Give us a week, your Honor.

25 THE COURT: Okay. You have a --

1 MR. MONTGOMERY: Yeah. Give us a week. It'll be --
2 if you don't mind, we'll submit it to you on the first day of
3 the trial.

4 THE COURT: Okay. I want to ask you about a couple
5 of entries in the brief that you did file.

6 MR. MONTGOMERY: Okay.

7 THE COURT: On page 27, you say -- and I want to
8 quote here. This is the brief you filed at Docket Number
9 805.

10 MR. MONTGOMERY: Yes.

11 THE COURT: You say, "As noted by the Sixth Circuit
12 in City of Pontiac Retired Employees Association, 213 Westlaw
13 4038528 at *1-2, the Michigan legislature evidenced an
14 unconstitutional, and undemocratic purpose in crafting PA
15 436," close quote. Similarly, on page 29 of that brief you
16 say, "The Michigan legislature, the Governor, and the
17 Emergency Manager have each made clear that abrogation of
18 municipal retirement compensation rights was the legislative
19 intent of the Act," referring to PA 436, "and is a central
20 purpose of this bankruptcy. That intent also was recently
21 recognized by the 6th Circuit in City of Pontiac Retired
22 Employees Association," same cite at *3. I have to say, Mr.
23 Montgomery, that I have studied that opinion by the Sixth
24 Circuit several times, and I cannot find these references. I
25 cannot find where the Sixth Circuit addressed or even

1 suggested anything about the constitutionality of PA 436. Am
2 I missing something or was this a mistake?

3 MR. MONTGOMERY: Well, unless my memory fails me,
4 your Honor, I think what we're referring to is the fact that
5 the Sixth Circuit said that PA 4, which was the immediate
6 predecessor of 436, had each of those purposes, your Honor,
7 and that, therefore, by extension --

8 THE COURT: Perhaps so, but the Court didn't say
9 anything about PA 436.

10 MR. MONTGOMERY: Well, other than that it was
11 adopted despite the fact that the referendum had overruled PA
12 4 and that it was virtually the same but for -- I believe the
13 phrase was an add-on for --

14 THE COURT: The Sixth Circuit did not say anything
15 about the purpose or intent of PA 436.

16 MR. MONTGOMERY: But it did as to 4, your Honor.

17 THE COURT: It did.

18 MR. MONTGOMERY: And it says 4 -- 436 is the same as
19 4. That's how we got there. Rightly or wrongly, that is how
20 we got there, your Honor. We say if the Sixth Circuit
21 identified a purpose of PA 4 as being the impairment of
22 pension --

23 THE COURT: Well, since you're going to file an
24 amended brief --

25 MR. MONTGOMERY: Yes, sir.

1 THE COURT: -- I want you to tell me very
2 specifically where in this City of Pontiac case the Court
3 said anything or suggested anything about the
4 constitutionality of PA 436.

5 MR. MONTGOMERY: All right. Your Honor, we will --

6 THE COURT: I agree with you it addressed it at
7 length with regard to PA 4 and expressed grave concerns about
8 it, but that's not the act before this Court today, so I
9 invite you to do that in your --

10 MR. MONTGOMERY: Of course.

11 THE COURT: -- new brief.

12 MR. MONTGOMERY: We'll add that discussion to our
13 ripeness supplemental brief.

14 THE COURT: All right. Thank you.

15 MR. MONTGOMERY: Thank you, your Honor.

16 THE COURT: Ms. Brimer, you may proceed for ten
17 minutes, please.

18 MS. BRIMER: Thank you, your Honor. Lynn M. Brimer
19 appearing on behalf of the Retired Detroit Police Members
20 Association. Your Honor, your concluding arguments or
21 discussion with Mr. Montgomery leads directly into the
22 discussion that I will have with you this morning, and that
23 has to do with the constitutionality of PA 436 under the
24 Michigan Constitution, your Honor. And first and foremost,
25 your Honor, I'd like to point out that in our brief we

1 noted -- and we cited the Schimmel case -- we noted that PA
2 436 was passed in what we believe is derogation of the
3 Michigan referendum provision in Article II, Section 9, of
4 the Michigan Constitution. It is well worth noting at the
5 outset of this discussion, your Honor, that that issue was
6 not addressed by either the city or the State of Michigan in
7 the pleadings they have filed.

8 With that, your Honor -- and I'll address that a bit
9 briefly later, your Honor. Article I, Section 1, of the
10 Michigan Constitution specifically provides that, "All
11 political power is inherent in the people. Government is
12 instituted for their equal benefit, security and protection."
13 Consistent with that maxim, Article II, Section 9, of the
14 Constitution specifically provides -- and it's a lengthy
15 provision, your Honor, so I'll read the relevant
16 provisions -- "The people reserve to themselves the power to
17 propose laws and to enact and reject laws, called the
18 initiative, and the power to approve or reject laws enacted
19 by the legislature, called the referendum. The power of the
20 referendum does not extend to acts making appropriations for
21 state institutions or to meet deficiencies in state funds."
22 As has been noted, your Honor, in a handful of cases that we
23 can find that address this case, this provision of referendum
24 is so significant and vital to our Constitution that Article
25 II, Section 9, further provides that, "No law as to which the

1 power of referendum properly has been invoked shall be
2 effective thereafter unless approved by a majority of the
3 electors voting thereon at the next general election."

4 As this Court is aware, I'm sure, on November 6,
5 2012, by referendum, the people of the State of Michigan
6 rejected Public Act 4 on a vote of 52 to 48 percent. That
7 was the Local Government and School District Act --
8 Accountability Act. On December 26, Governor Snyder approved
9 Public Act 436, the Local Financial Stability and Choice Act,
10 a virtually identical law to Public Act 4.

11 In order to avoid subjecting Public Act 436 to
12 referendum, two very minor spending provisions were tacked on
13 at the back end. Section 34 of the Act provides that for the
14 fiscal year ending 9-30, 2013, \$780,000 is appropriated to
15 administer the Act, in essence, to pay the salaries of the
16 emergency managers appointed thereunder, and Section 35
17 provides that \$5 million is appropriated for the same time
18 frame for the professionals such as lawyers and financial
19 consultants that are engaged under the Act. The spending
20 provision was not at all a general spending provision for the
21 State of Michigan but a very limited provision relating
22 directly to the Act.

23 We have researched, your Honor, and cannot find a
24 single instance where the voters of Michigan have
25 specifically rejected a law and shortly thereafter the

1 governor passes a very similar law, if not identical, and
2 tacked on a spending provision in an effort to remove it from
3 the otherwise democratic process of the State of Michigan.

4 There are a handful of cases in Michigan that do
5 address the referendum. In the case of Kuhn v. Department of
6 Treasury at 384 Mich. 378, 1971, the Michigan Supreme Court
7 specifically provided or held that the phrase in the preamble
8 of that -- the Income Tax Act of 1967, which provides that
9 the Act is for the purpose of meeting deficiencies in state
10 funds was not, in fact, sufficient when at the time the state
11 did not have any state deficiencies in its funding, and,
12 therefore, that provision in the preamble did not, in fact,
13 remove the Income Tax Act of 1967 from the power of
14 referendum. Unfortunately, in that case the plaintiff had
15 not complied with the requirements for referring the matter
16 to the -- or the law to the referendum, and so the Court was
17 not able to render any further opinion regarding that
18 language and its impact on the -- whether or not that case
19 had -- that law had it been brought to referendum. However,
20 it's instructive to this Court. The law at issue in that
21 case had not previously been rejected on referendum, so,
22 therefore, it does have some influence in how this Court
23 should interpret how the Michigan Supreme Court may view the
24 two spending provisions tacked onto Public Act 436. Public
25 Act 4 had, in fact, been rejected by the state through a

1 proper referendum. The spending provisions were added on in
2 an effort to remove the case -- the law from the referendum
3 in derogation of the provision in Article II, Section 9,
4 which provides specifically that no law to which the power of
5 referendum had been properly applied shall be effective
6 thereafter unless approved by a majority of the electors
7 voting thereon at the next general election.

8 THE COURT: Okay. So I have this question for you
9 regarding this argument, and it's, again, a ripeness question
10 and a standing question. How does any party have standing to
11 challenge the constitutionality of PA 436 on this ground or
12 why is it ripe until such a party has complied with all of
13 the legal requirements to have a referendum regarding that
14 put on the ballot and it being rejected because the law isn't
15 subject to a referendum because of this appropriations
16 provision?

17 MS. BRIMER: I don't believe, your Honor, that by
18 adding on the spending provision, which on its face took
19 Public Act 436 out of the referendum provision of the
20 statute -- if that is the case, your Honor, then you have
21 read out the referendum from the Michigan Constitution. I
22 think this is precisely the mechanism by which the
23 constitutionality of the law now should be challenged. When
24 that law was then relied upon for purposes of the appointment
25 of an emergency manager, that is precisely, I believe, your

1 Honor, how this would come to a court for review. On its
2 face, the governor attempted to remove this from the
3 referendum. It was removed from the referendum, but you
4 can't read that out of the law and read out of the
5 Constitution the second provision, which requires that any
6 law that has been rejected by referendum be resubmitted to
7 the electorate.

8 I see I'm running out of time, your Honor. What I
9 would like to note, your Honor, is that while you are correct
10 that the Sixth Circuit did not specifically rule on 436 --
11 I've read that case closely several times -- 436 was not
12 before the Court, and, as you'll recall, some of the matters
13 at issue in that case were what precisely is before the Court
14 because some of the arguments had not even been preserved on
15 appeal. However, I think the tone of the Sixth Circuit when
16 it said, "Apparently unaffected that voters had just rejected
17 Public Act 4, the Michigan Legislature enacted, and the
18 Michigan governor signed, Public Act 436. Act 436 largely
19 reenacted the provisions of Public Act 4, the law the
20 Michigan citizens had just revoked. In enacting 436, the
21 Michigan Legislature included a minor appropriations
22 provision, apparently" -- they didn't say "in fact," but
23 "apparently to stop Michigan voters from putting Public Act
24 436 to a referendum." I think that gives us a tone, and I
25 also think it's noteworthy, your Honor, that despite the fact

1 that the city noted on page 15 of Exhibit A to their
2 consolidated response to the objections that we had raised
3 this specific issue, it is not addressed. It is not
4 responded to by either the state or the city. It stands
5 unrefuted at this point, your Honor.

6 THE COURT: Thank you.

7 MR. GOLDBERG: Good morning, your Honor. Jerome
8 Goldberg appearing on behalf of interested party David Sole,
9 who is a city retiree, as is his wife, Joyce Sole.

10 THE COURT: And you may proceed for ten minutes,
11 sir.

12 MR. GOLDBERG: Thank you, your Honor. While I
13 certainly concur with many of the eloquent arguments put
14 forth by counsel prior to myself, I want to approach the
15 issue from a somewhat narrower point of view from the prism
16 of Michigan state law and specifically from the Michigan --
17 how Michigan state law views the issue of statutory
18 construction.

19 As we know, 11 U.S.C. 109 states that a local
20 municipality must be specifically authorized by state law to
21 file a Chapter 9 bankruptcy. The phrase "authorized by law"
22 refers to the law of the state, and I cited Bekins for that
23 principle. States act as gatekeepers to their municipalities
24 and access to relief under the Bankruptcy Code.

25 As we all know, the basis for the state law

1 authorizing the filing of this Chapter 9 is Public Act 436,
2 and Public Act 436 has several different provisions that I
3 think it's worth looking at to get an understanding for why
4 we believe the failure to include a contingency to bar the
5 impairment of pensions is violative of state law. It
6 provides the emergency -- Section 1551(c) provides the
7 emergency manager with the power to carry out the
8 modification, rejection, termination, and renegotiation of
9 contracts. Section 1552 provides the emergency manager again
10 with the power to reject, modify, or terminate, one, terms of
11 an existing contract. Section K gives the emergency manager
12 the power to reject, modify, or terminate an existing
13 collective bargaining agreement. Section 12 contains
14 provisions for the renegotiation of debt, and it's laid out
15 in Section 12. But what Section 1552(m) -- Section 12(m),
16 when it deals with the question of pensions, it explicitly
17 includes within the section, within the statute, the --
18 states that the emergency manager must fully comply with
19 Article IX, Section 24, of the Michigan Constitution, which
20 is the constitutional prohibition on diminishing or impairing
21 contract. In addition, Section 1558 states that the governor
22 may place contingencies on a local government in order to
23 proceed.

24 When you view the statute -- the authorizing statute
25 from the prism of the Michigan rules on statutory

1 construction -- and I cited the Pohutski case, which many --
2 is the seminal case on statutory construction in the State of
3 Michigan, Pohutski -- the Michigan Supreme Court in Pohutski
4 stated, "When parsing a statute, we presume every word is
5 used for a purpose. As far as possible, we give effect to
6 every clause and sentence. 'The Court may not assume that
7 the Legislature inadvertently made use of one word or phrase
8 instead of another.' Similarly, we would take care to avoid
9 a construction that renders any part of the statute
10 surplusage or nugatory." And, in addition, Michigan courts
11 follow the doctrine of expression unius exclusion alterius,
12 the expression of one thing is the exclusion of another.

13 We would submit that in construing Public Act 436 as
14 a whole, in construing it as a whole, any -- you can't allow
15 for the filing of a Chapter 9 unless the Chapter 9 includes
16 the contingency for not impairing the pension rights under
17 Article 24. Otherwise it would negate that section or
18 declare that section void, and that would be an express
19 violation of the Michigan Rules of Statutory Construction,
20 which the Court is bound to follow at this stage in the
21 proceeding because in the eligibility proceeding, it is state
22 law, state law that is dominant. We believe, based on --

23 THE COURT: But aren't there many, many, many
24 conditions that the governor could have put on the filing in
25 order to assure the emergency manager's compliance with state

1 law?

2 MR. GOLDBERG: There are certainly different --

3 THE COURT: Equal protection, due process of law,
4 freedom of speech.

5 MR. GOLDBERG: But what I'm submitting, your
6 Honor --

7 THE COURT: There are lots of constitutional rights.

8 MR. GOLDBERG: Certainly. But what I'm submitting
9 is we have to look at the statute as it is written. That's
10 what the Michigan courts rule over and over again. Those are
11 the fundamental rules of statutory construction enunciated by
12 the Michigan Supreme Court in case after case. In this case,
13 we look at the words of the statute. We don't read into the
14 statute. We look at the words of the statute. This statute
15 contains an explicit guarantee of pensions, a guarantee --

16 THE COURT: Well, and the governor says --

17 MR. GOLDBERG: It includes Article IX.

18 THE COURT: The governor says the filing will comply
19 with state law, doesn't he?

20 MR. GOLDBERG: Well, the governor may say it, but
21 the governor is not the final arbiter, your Honor. That's
22 what the Court is for, and what we -- and the governor is not
23 above the law.

24 THE COURT: Why isn't that a sufficient protection?

25 MR. GOLDBERG: I'm sorry.

1 THE COURT: Why isn't that a specific -- a
2 sufficient protection?

3 MR. GOLDBERG: Why isn't what the governor says a --

4 THE COURT: No. Why isn't the fact that this Court
5 will apply state law a sufficient protection?

6 MR. GOLDBERG: Well, we would submit, your Honor,
7 that state law at this stage of the proceeding, at the
8 authorization stage, is the determinative factor. Once we go
9 into the -- once you make the eligibility determination, as
10 Mr. Montgomery indicated and as the case law as I've read it
11 indicates as well, that's where federal law -- there's a
12 question of federal supremacy over state law, but at this
13 stage it's state law that is determinative, and the state law
14 in this case explicitly mandates a contingency for the
15 guaranteeing of pensions. Otherwise we've written that
16 section --

17 THE COURT: If we're going --

18 MR. GOLDBERG: -- out of the authorization
19 statute --

20 THE COURT: If we're going to look at --

21 MR. GOLDBERG: -- and that's an explicit violation
22 of statutory construction.

23 THE COURT: If we're going to look at statutory law
24 and every word of it, how do you deal with the city's
25 argument that the word "thereby" in the constitutional

1 provision only prohibits the impairment of pensions by the
2 state or its political subdivisions; it does not prohibit the
3 impairment of pensions by a United States Bankruptcy Court?

4 MR. GOLDBERG: That's exactly the point, your Honor.
5 That's exactly the point. At this stage of the proceeding,
6 according to Bekins, according to Harrisburg, and according
7 to every case I've read, according to Collier's, it's state
8 law that is determinative. That's why --

9 THE COURT: And that's what I'm asking.

10 MR. GOLDBERG: That's why the question --

11 THE COURT: And that's exactly what I'm asking you
12 about. If we're going to read every word of the statute and
13 apply every word of the statute, including the word
14 "thereby," why doesn't state law permit the Bankruptcy Court
15 to impair pensions?

16 MR. GOLDBERG: Because the authorization statute
17 that this Court is relying upon, which it has to rely upon
18 because otherwise there would be no Chapter 9 filing, there
19 has to be a specific authorization under state law; correct?
20 I mean there are 20 -- many states don't have one. You have
21 to rely on the state law. That state law contains an
22 explicit clause that impair -- pensions cannot be impaired.
23 It's not just written in one place actually. It's written in
24 two places in that statute. Again, I'm submitting that down
25 the road, if we get past this eligibility question on this,

1 perhaps what you said is correct. At that point federal
2 law -- you make the determination based on federal law, but
3 right now you are duty bound to make that determination based
4 on your examination of state law and by applying the state
5 law --

6 THE COURT: What is the --

7 MR. GOLDBERG: -- principles of statutory
8 construction.

9 THE COURT: What is the exact state law language in
10 PA 436 that you rely on?

11 MR. GOLDBERG: I rely on the language -- here, let
12 me find it right here.

13 THE COURT: Okay.

14 MR. GOLDBERG: "The emergency manager shall fully
15 comply with the public employee retirement system investment
16 act and Section 24 of Article IX of the state Constitution,
17 and any actions taken shall be consistent with the pension's
18 qualified status"; that he's -- this emergency manager has to
19 abide by the constitutional impairment.

20 THE COURT: So my question for you remains if this
21 Bankruptcy Court were to approve a plan -- and I want to say
22 here I have no predisposition on this issue at all. This is
23 strictly hypothetical legal talk to figure out where we are.
24 If this Court were to approve a plan that impairs pensions --
25 again, not presuming at all that it will -- but if it did, is

1 that the city impairing pensions, or is that the Bankruptcy
2 Court impairing pensions because --

3 MR. GOLDBERG: That would be impairing --

4 THE COURT: -- the law prohibits the city from doing
5 it? There's a question about whether it prohibits the
6 Bankruptcy Court from doing it.

7 MR. GOLDBERG: That's precisely why I'm making the
8 argument, your Honor. There is a -- there is a question as
9 to whether -- once we get past the eligibility and this Court
10 is looking at the plan, whether this Court then has the
11 authority under federal law to ignore the state law and state
12 constitutional protection. I'm not saying it does, but
13 there's at least a question, and a lot of the case law
14 indicates that, but we're not at that stage right now. We're
15 at the eligibility stage, and clearly at the eligibility
16 stage it's state law that predominates. It's state law
17 that's determinative, and it's state law that this Court has
18 to look at, not federal law but state law that this Court has
19 to look at in making its determination as to whether the
20 authorization meets the muster. And what I would submit,
21 that under state law principles, as I indicated, we look at
22 the authorization statute, we look at the plain language of
23 the statute, and we look at the Michigan rules on statutory
24 construction as a -- and there's no way to allow for a filing
25 that would not have a contingency that bars the impairment of

1 pensions. It's interesting to me you raised before to Mr.
2 Montgomery --

3 THE COURT: Actually, your time has expired, so I do
4 have to ask you to wrap up.

5 MR. GOLDBERG: Okay. Well, I'll make one last
6 point. You raised very briefly to Mr. Montgomery why not
7 every contract, but, as I indicated, other contracts are
8 provided for the impairment of those contracts under the PA
9 436. It's the impairment of pensions that's explicitly taken
10 away from the authority of the emergency manager, and I
11 submit because of that that any authorization that doesn't
12 include a contingency barring the impairment of pensions
13 would violate Michigan state law and violate the Bankruptcy
14 Code, in essence, itself. Thank you.

15 THE COURT: Thank you.

16 MS. CRITTENDON: Good morning, your Honor. Krystal
17 Crittendon, and I want to thank the Court for giving me the
18 opportunity to speak this morning.

19 THE COURT: Welcome, and you may proceed for five
20 minutes.

21 MS. CRITTENDON: Thank you, your Honor. Before the
22 Court goes any further, I would just ask that the Court step
23 back and look at the process and how we got to where we are
24 from a legal foundational standpoint, and to that end, I make
25 three objections, your Honor.

1 First, the City of Detroit does not have a duly
2 appointed emergency manager because there was no EM or EFM
3 law in place at the time that appointment was made. As the
4 Court knows, in 2011, Public Act 4, commonly known as the
5 Emergency Manager Act, repealed Public Act 72. In November
6 of 2012, the people of the State of Michigan repealed Public
7 Act 4 by referendum. Pursuant to Michigan law -- and this is
8 at MCL, Michigan Compiled Law, 8.4 -- "Whenever a statute, or
9 any part thereof shall be repealed by a subsequent statute,
10 such statute, or any part thereof, so repealed, shall not be
11 revived by the repeal of such subsequent repealing statute."
12 In short, that is saying that when PA 4 repealed Public Act
13 72 and PA 4 was then repealed by referendum, PA 72 was not
14 revived. It did not spring back to life.

15 On March 14, 2013, a contract was purportedly
16 entered into between the State of Michigan and Kevyn Orr
17 appointing him EFM for the City of Detroit. However -- under
18 PA 72. However, because PA 72 was not alive at that time,
19 that appointment was not legal and is defective, and for that
20 reason, Mr. Orr is not a duly appointed emergency manager for
21 the City of Detroit.

22 The second argument, even had there been an
23 emergency manager law in place, Mr. Orr would not have been
24 an EFM at the time PA 436 came into place because his
25 contract, the contract between he and the state, was expired

1 on the day that PA 436 came into place, so he would not have
2 been grandfathered in under PA 436.

3 Finally, under Chapter 9 of the Bankruptcy Code,
4 there is no ability for there to be an involuntary
5 bankruptcy, and because the municipality would had to have
6 filed the petition, and in this case the municipality, being
7 the mayor and City Council, did not file the petition, the
8 petition filed by Mr. Orr was defective, and the filing
9 should be dismissed.

10 For those reasons -- and I see that my yellow light
11 is on -- time goes really really quickly when you have five
12 minutes, but I'd answer any questions the Court has.

13 THE COURT: How much time is left when the yellow
14 goes on, Kelli? Do you know?

15 THE CLERK: Three minutes.

16 THE COURT: It's three minutes, so you only --

17 MS. CRITTENDON: Okay.

18 THE COURT: -- had two under green and three under
19 the yellow, so --

20 MS. CRITTENDON: Okay. Thank you, your Honor.

21 THE COURT: -- you may proceed.

22 MS. CRITTENDON: Mr. Orr's contract at Section 2.2
23 of that contract provides that his contract was effective on
24 Monday, March 25th, and terminated at midnight on Wednesday,
25 March 27th. Midnight March 27th was a Wednesday morning at

1 12 o'clock a.m. The new emergency manager law, PA 436, did
2 not take place -- did not become effective until Thursday,
3 March 28th. Under 14 -- MCL 141.1572, it provides that an
4 emergency manager or emergency financial manager appointed
5 and serving under state law immediately prior to the
6 effective date of this Act shall continue under this Act as
7 an emergency manager for the local government. Because the
8 City of Detroit was without an emergency manager or emergency
9 financial manager for one full day before the Emergency
10 Manager Act, PA 436, became effective, Mr. Orr could not
11 continue in that capacity, as used in this section, because
12 he was without a contract.

13 Finally, I would just say there are a number of
14 cases under the federal Bankruptcy Court law that talk about
15 involuntary bankruptcies. This is akin to an involuntary
16 bankruptcy when someone other than the City of Detroit, which
17 is its mayor and City Council, filed the petition. And for
18 those reasons, the petition was defective. Section 109 of
19 the Bankruptcy Code talks to the authorization of the state
20 to approve a bankruptcy if filed by a municipality. In this
21 case, that is not what happened. It was the state
22 effectively filing the petition and approving the petition
23 being that the emergency financial manager, assuming that we
24 had one, would be an operative of the state and not an
25 operative of the City of Detroit. Thank you, your Honor.

1 THE COURT: Is the contract on which you rely in the
2 record of the case?

3 MS. CRITTENDON: I don't believe it is. I do have a
4 copy of the contract with me if the Court would like to see
5 it. I'm assuming that one of the parties --

6 THE COURT: If you'd like me to consider it, you
7 should --

8 MS. CRITTENDON: I will file it.

9 THE COURT: -- file it.

10 MS. CRITTENDON: I will, and I will file a brief
11 that memorializes everything that was said today.

12 THE COURT: All right.

13 MS. CRITTENDON: Thank you, your Honor.

14 MR. MORRIS: Good morning, your Honor. Thomas
15 Morris on behalf of the Retiree Association parties. The
16 Retiree Association parties who I represent include two
17 individuals. There was some discussion about the committee's
18 standing to raise certain objections. The committee argued
19 those objections very ably. We concur in those objections,
20 and that includes the concurrence of those individuals. We
21 trust that would take care of any standing issue if there
22 were one. And the comments that preceded us -- preceded me
23 were very ably made, so I'm just going to address a very few
24 points.

25 One is a point the Court -- a question the Court had

1 raised about the "thereby" language in the pensions clause.
2 It's important for the Court to note that it's the city that
3 files any plan, the city that proposes any plan, negotiates
4 any plan. Chapter 9 precludes the Court from appointing a
5 trustee, from converting the case, from interfering with the
6 city's ability to manage its fiscal affairs. A case cannot
7 be filed involuntarily under Chapter 9. As the Bekins court
8 said, quoting from the legislative history on page 51, "The
9 taxing agency itself is the only instrumentality which can
10 seek the benefits of the proposed legislation." We think
11 it's clear that any action to impair the pensions by the city
12 would, first of all, be improper, but, second of all, it
13 would be the city's action.

14 Now, the city has taken the position that somehow
15 the pensions clause of the Michigan Constitution is
16 preempted, and we disagree with that, but the city can't have
17 it both ways. They have a theory -- they've made a number of
18 multiple arguments, but they have a theory that once they got
19 into Bankruptcy Court -- or if they get -- are found
20 eligible, then the pensions clause is off. Well, if that's
21 the case -- and it's not the case, but if that were the case,
22 then it would be the action of the authorization of the
23 filing and the action of the city in filing the case which
24 would be impairing the pensions. What happens if the city is
25 found ineligible?

1 THE COURT: Well, but that's true only if as part of
2 eligibility the Court ruled on the issue of pension rights
3 and ruled in the city's favor.

4 MR. MORRIS: This ties in with arguments that were
5 made by other counsel, and if Public Act 436 enables the city
6 to impair the pensions, then Public Act 436 in that respect
7 is unconstitutional. It's inconsistent with the pensions
8 clause. Of course, the pensions clause is part of the
9 Michigan Constitution, the supreme law of our state, and the
10 Public Act 436 must comply with it. Public Act 436, in fact,
11 gives recognition to the pension clause and acknowledges it,
12 and it even authorizes the governor to make compliance with
13 the pension clause a precondition. However, that didn't
14 happen in this case, and that's one of the -- one of the
15 issues that has been raised by other counsel.

16 Your Honor, if the city is found to be ineligible,
17 from the standpoint of the retirees, the city will have to
18 make a choice. It can choose to comply with the pensions
19 clause and not impair pensions, just say we're going to
20 comply with the Michigan Constitution, or it can negotiate
21 with the retirees through their associations. That process
22 was shortcut here, and that will be one of the factual issues
23 we've raised.

24 Now, if the city goes forward with a plan that does
25 not impair pensions, one of the Court -- one of the questions

1 the Court had was what happens then, what happens if the city
2 just doesn't have the money. Well, there's an issue of
3 whether the state is liable. There's the potential issue.
4 But those are all issues apart from -- they're nonlegal
5 issues. The most the retirees can ask for is that the city
6 doesn't impair the pensions. The ultimate solution for the
7 retirees comes elsewhere. Will the city have -- will the
8 state have to step in to help the city? Will the city have
9 to do other things to raise money? I don't know, but those
10 are beyond our legal issues.

11 Your Honor, the city holds the key on this issue of
12 eligibility. It can agree to comply with the Michigan
13 Constitution or it can negotiate with the retirees and reach
14 a resolution. The proper outcome here is for the city to go
15 back -- as Section 109 intends, go back and either not impair
16 the pensions, which is our preference, or negotiate with the
17 retirees. Thank you.

18 THE COURT: Thank you.

19 MS. FLUKER: Good morning, your Honor. Vanessa
20 Fluker on behalf of Center for Community Justice and
21 Advocacy.

22 THE COURT: Would you repeat your name for me,
23 please?

24 MS. FLUKER: Vanessa Fluker.

25 THE COURT: Okay. Thank you.

1 MS. FLUKER: F-l-u-k-e-r. Your Honor, the issue I'm
2 raising today before this Court with respect to eligibility
3 is a failure of the emergency manager to comply with the
4 statutory mandates under PA 436, Section 16, which is
5 actually Section 1556. That section specifically mandates,
6 and I quote, "an emergency manager shall," not "may," not
7 "might, "shall, on his own -- his or her own or upon the
8 advice of the local inspector if a local inspector has been
9 retained, make a determination as to whether possible
10 criminal conduct contributed to the financial situation
11 resulting in the local government's receivership status. If
12 the emergency manager determines that there is a reason to
13 believe criminal conduct has occurred, the manager shall
14 refer the matter to the attorney general or local prosecuting
15 attorney for investigation." There has been some extensive
16 arguments about the tenets of statutory construction, so I
17 won't go through Pohutski step by step, but we're all aware
18 that you must adhere to the plain unambiguous language of the
19 statute.

20 In this particular instance, two of the city's
21 largest creditors, UBS and Bank of America, have been found
22 convicted -- criminally convicted in UBS's case of criminal
23 conduct involving municipal bonds. In fact, the SEC fined
24 UBS \$47,207,180 in Case Number 11-2539, U.S. District Court,
25 New Jersey. Three UBS executives were indicted and convicted

1 of fraud related to municipal bond rigging, and that was in
2 New York, Southern Division, Case Number 10-1217. A Bank of
3 America executive was indicted July 19th, 2012, for bid
4 rigging of fraud municipal bonds. And what's so significant
5 about this, in the criminal conviction with the SEC case, the
6 civil penancy case, it involved a Detroit bond. This
7 provision cannot be ignored, and the mere fact that it's
8 mandatory because it indicates "shall" is very significant.
9 In fact, it is common knowledge at this point that the
10 emergency manager had knowledge of this information and did
11 not act on it. In his deposition on August 30th, 2013, he
12 was specifically asked on these issues,

13 "Are you aware of issues that have come out with
14 regard to the LIBOR specifically with UBS and Bank
15 of America in the setting of using the LIBOR as a
16 standard?

17 Answer: I am aware.

18 Question: Are you aware that UBS has been sued
19 by the Securities and Exchange Commission for
20 rigging in regard to municipal bonds?

21 In past years?

22 There was a final judgment -- yes, in past
23 years.

24 Answer: Yes. I've heard that. I have not read
25 the final judgment.

1 Question: Are you aware that Bank of America
2 has been investigated for potential bond rigging
3 with regard to the municipal bond market?

4 Answer: I am aware that Bank of America has
5 been investigated. The exact specifics of the
6 investigation I am not aware of."

7 This clearly shows that there is not just a
8 noncompliance with 1556, there's a knowing noncompliance with
9 1556. There should have been a criminal investigation, which
10 is mandated by the statute, and, in essence, is necessary to
11 even get to the point of making a recommendation for a
12 bankruptcy. How can you say that we need bankruptcy when you
13 don't know whether there is going to be fraud determined and
14 there may be funds that may be necessary to be paid back to
15 the city that can offset any debt, which also goes to the
16 issue of how are you saying that you're eligible for
17 bankruptcy when you really don't know what the debt is based
18 on the potentiality of fraud in these municipal bond
19 transactions, who are also standing --

20 THE COURT: Are you saying that the emergency
21 manager, whose term in office is limited by law, was required
22 to await what could be years of litigation to determine these
23 issues and UBS's liability before filing bankruptcy?

24 MS. FLUKER: I don't think he had to determine years
25 of litigation, but I think that it would be very evident that

1 you would look at least at the debt that you're alleging that
2 the city owes, and if there is common knowledge of such
3 information, which this is -- this is not something that you
4 have to wait years in litigation. This has been all over the
5 news, the Internet, and everything else. And as he admitted
6 in his deposition, he was aware of it, and that being the
7 case, that actually heightens the duty, in addition to the
8 mandatory language of Section 1556, which says "shall."

9 THE COURT: Shall do what?

10 MS. FLUKER: The statute specifically says the
11 emergency manager shall, on his or her own or upon the advice
12 of a local inspector, make a determination -- there had to be
13 a determination made -- whether there was criminal conduct
14 that affected the financial situation of the city. Even if
15 he didn't know all this, say for some reason this
16 information -- I see my time is up. I'll just complete this
17 sentence. Say this information he had no knowledge of.
18 There was -- we just don't know about it. He still had a
19 duty to make a determination. Well, in my estimation,
20 there's been no criminal conduct that contributed to the
21 financial situation of the city. This provision was not
22 complied with at all, and you cannot try to exercise one part
23 of the statute by totally ignoring and having noncompliance
24 with another. Therefore, I would request that this Honorable
25 Court deny eligibility for the reasons set forth by all the

1 objectors.

2 THE COURT: Thank you.

3 MS. FLUKER: Thank you.

4 THE COURT: Mr. Gordon, may I have your attention,
5 please?

6 MR. GORDON: Yes, your Honor.

7 THE COURT: Are you up next?

8 MR. GORDON: I am.

9 THE COURT: Okay. Do you want to give part of your
10 argument now, or do you want to take a lunch break now and
11 then do your entire argument after lunch? I leave it to you.

12 MR. GORDON: If it's okay with the Court, I would
13 prefer the latter, to just start after lunch.

14 THE COURT: Okay. All right. We will take our
15 lunch break now, and we will reconvene in an hour and a half,
16 so that'll be 1:20, please. Twenty after one we'll
17 reconvene.

18 MR. GORDON: Thank you, your Honor.

19 THE CLERK: All rise. Court is in recess.

20 (Recess at 11:48 a.m., until 1:20 p.m.)

21 THE CLERK: Court is in session. Please be seated.
22 Recalling Case Number 13-53846, City of Detroit, Michigan.

23 THE COURT: Good afternoon, everyone. It looks like
24 everybody is here. Actually, Mr. Gordon, with your
25 permission, before I hear from you, I have a follow-up

1 question for one of your colleagues.

2 MR. GORDON: By all means, your Honor.

3 THE COURT: Ms. Brimer, would you resume the
4 lectern, please?

5 MS. BRIMER: Should I bring something with me, your
6 Honor?

7 THE COURT: Possibly.

8 MS. BRIMER: I didn't know I was going to the
9 principal's office.

10 THE COURT: No, no, no. It's nothing like that.
11 You argued that the enactment of PA 436 violated the people's
12 referendum rights because PA 436 was so similar to PA 4.

13 MS. BRIMER: Yes, your Honor.

14 THE COURT: That was your argument. Was there a
15 statutory basis for that argument, or was it just based on
16 the people's right of referendum?

17 MS. BRIMER: It's based on the constitutional right
18 of referendum, your Honor.

19 THE COURT: Okay. So there's not a statute we
20 should be looking for on that.

21 MS. BRIMER: Not that I'm aware of, your Honor.

22 THE COURT: All right. That was it.

23 MS. BRIMER: Thank you, your Honor.

24 THE COURT: That was it. Okay. Mr. Gordon.

25 MR. GORDON: Thank you, your Honor. Just to give

1 your Honor a little bit of a road map of the things that I
2 want to touch upon, if that's of help, I thought I would
3 touch upon some of the issues regarding the state law
4 consent, some of the issues that have been raised this
5 morning, then move on to a discussion of some other
6 considerations relevant to the difference between the
7 pensions clause and the contract clause, and then address the
8 issue of what would happen if the Court ruled in our favor
9 that the accrued pension benefits cannot be impaired and what
10 that means for the restructuring, and I think I can add some
11 important information there. And then finally, if there's
12 still time, I would touch upon the collateral estoppel
13 Webster issue, which is in our papers.

14 So, your Honor, we will start with the consent
15 issues under 109(c)(2), and to be clear, in our papers, while
16 we talk -- touch upon the possibility of PA 436 being
17 unconstitutional as applied, the thrust of our papers is that
18 PA 436 needs to be read and can be read in a way that's
19 consistent with the pensions clause and so forth so that
20 there's no need to get to issues of constitutionality.
21 109(c)(2) clearly is an issue that is an issue purely of
22 state law. It is a threshold issue. It is an eligibility
23 issue, and we want to emphasize that it stands on its own,
24 and it can't be conflated with plan confirmation issues.

25 THE COURT: And with apologies, I have to stop you

1 there with this question. There seems to be a general thread
2 of assumption that whether a state has given authorization
3 under 109(c)(2) is a question of state law, as you just said.
4 I have to say that's not altogether clear to me. It seems to
5 me there might very well be an argument that the standard as
6 to whether the state has given proper authorization is a
7 federal standard, not a state standard. Why? Because in
8 addressing cases in the amendment right next door to Article
9 X -- that is, Article XI -- sorry -- Amendment XI, the 11th
10 Amendment, when we talk about sovereign immunity, the issue
11 of whether a state has given its consent or its waiver of
12 sovereign immunity is a question to be determined by federal
13 law, not state law.

14 MR. GORDON: Your Honor, in that regard, I think
15 that the Tenth Amendment is different, and it looks first to
16 respect the contours of what is reserved to the states in the
17 first instance, so here I think you have to start with
18 whether there is valid -- I think, at a minimum, the question
19 is is there valid state authorization for submitting a
20 political subdivision of the state to the jurisdiction of the
21 federal government and the federal courts. I would at least
22 put it that way. And so that does turn on state law, and we
23 would submit that all portions of state law need to be looked
24 to and harmonized in that regard, and that's sort of the
25 holding of Harrisburg, which we submit is instructive here

1 and which has not been really in any way refuted by the city.
2 And even the United States Attorney has stated that Congress
3 reserved to the state the right to regulate, and I quote,
4 "under what terms," end quote, its political subdivisions may
5 avail themselves of Chapter 9, so it really is a matter, I
6 believe, of state sovereignty, and it's up to the state to
7 determine how and when a political subdivision can avail
8 itself, and how it does that is in part expressed by the will
9 of the people, as embodied in the pension clause, and it
10 needs to be respected.

11 The response of the city and the state is on two
12 levels. One, first of all, it is asserted that the actions
13 of the governor in authorizing do not conflict with the
14 pensions clause because the authorization itself didn't
15 create any impairment and that it's unclear whether the city
16 will ultimately seek to impair, and if such impairment
17 occurs, it won't be the city or the state that has done it.
18 It'll be the Bankruptcy Court. Respectfully, we say that
19 those arguments are all unavailing. First of all, one of the
20 things that I think has not been made clear this morning is
21 some of the things that have come out in discovery. I don't
22 actually think these things are relevant, but I'll get to why
23 I think they're not relevant in a minute, but I think it's
24 important for the Court to know that in discovery propounded
25 by the Retirement Systems or conducted by the Retirement

1 Systems, the city has admitted that it was an explicit intent
2 in the restructuring plan proposed in June and in the
3 bankruptcy recommendation letter submitted on July 16th by
4 Mr. Orr that accrued pension benefits needed to be impaired.
5 The city has also admitted in admissions that its intent in
6 the Chapter 9 case is to impair and diminish accrued pension
7 benefits, so there is absolutely nothing speculative about
8 that. The governor has also testified that he was aware that
9 accrued pension benefits may be impaired. He also testified
10 that he understood that he could put conditions on the
11 consent and authorization and that he chose not to. Mr. Orr
12 also testified that he could not guarantee that if a
13 consensual plan couldn't be achieved, that he would not
14 resort to cramdown provisions in order to cram down upon the
15 retirees. So there really is nothing speculative here, and
16 for anyone to say that it is speculative is really -- I mean
17 it just is not -- it's just not factual.

18 THE COURT: Well, but what would be the --

19 MR. GORDON: The other thing is that --

20 THE COURT: What would be the impact on that
21 argument if the state, under this Constitution, does have a
22 legal constitutional obligation to guarantee the pension
23 payments, an issue not yet determined? And I don't mean to
24 suggest the outcome of that by raising this possibility.

25 MR. GORDON: Your Honor, I mean if the -- the

1 problem is that today is the day for eligibility, and we
2 don't know that today. If the state came forward today and
3 said that they would backstop, you know, the full accrued
4 pension benefits, that might be a different situation, but it
5 not being here today, that isn't --

6 THE COURT: And you're not prepared to say here
7 today that you're not going to request that conclusion, are
8 you?

9 MR. GORDON: No. I will not say that, but that's --

10 THE COURT: That would not be in your client's best
11 interest.

12 MR. GORDON: Of course not. Of course not, but that
13 has not been determined today. The state is not coming
14 forward today. And eligibility goes to whether this Court
15 even has jurisdiction, and what the city is asking is for the
16 Court to essentially suspend the issue of whether it even has
17 jurisdiction in order to get everybody together, and really
18 you're putting the will of the people and the protections of
19 the Michigan Constitution in jeopardy or being held in the
20 hold while the city wants to move forward with its proposals
21 and bring people to the table, and I would submit that that's
22 inappropriate. This is an eligibility hearing, and the
23 governor's responsibility is an affirmative responsibility to
24 uphold the Constitution. To suggest that we don't know
25 what's going to happen down the road reduces his obligation

1 to sort of a wink and nod type of standard, and we submit
2 that that is just inappropriate. He is to uphold the
3 people's will.

4 THE COURT: Well, he's to uphold the law.

5 MR. GORDON: The other thing is, your Honor, that to
6 say that someone other than the state or the emergency
7 manager would be the one impairing the benefits is just not
8 correct. As the Court well knows, the city is the one that
9 would have to propose the plan. The Court would not propose
10 the plan. Essentially what is happening here would be that
11 the governor, through the authorization, is delegating
12 authority that he does not have. He does not have the
13 authority to abrogate the state Constitution. By authorizing
14 the emergency manager to pursue the bankruptcy -- again,
15 we're at the eligibility stage -- he cannot give authority to
16 the emergency manager that he does not have, so the question
17 becomes --

18 THE COURT: The argument is he doesn't have the
19 authority to impair the pensions.

20 MR. GORDON: That's correct. If he wanted to do
21 that, he'd have to go get a constitutional amendment.

22 THE COURT: And -- okay.

23 MR. GORDON: So he does not have the authority to
24 delegate or to bestow upon anybody else the ability to
25 impair, so the question really is why wouldn't we put a

1 condition today saying that you can move forward in the
2 Chapter 9, but you can't impair the accrued pension benefits?
3 That to us complies with the requirements of the state
4 structure, and there has absolutely been no explanation of
5 why that wouldn't be done today. We think that's the real
6 question is why wouldn't you -- why wouldn't the governor put
7 that condition in or why can't the Court imply that as a
8 matter of law?

9 If I may, your Honor, I'd like to move on to the
10 pensions versus contracts issue.

11 THE COURT: Well, hold on one second. The Sixth
12 Circuit has actually addressed -- I know you're concerned
13 about time --

14 MR. GORDON: Okay.

15 THE COURT: -- the issue of how to determine
16 eligibility in bankruptcy, now not in Chapter 9, but it did
17 so in Chapter 13 because there is a factual eligibility issue
18 there, has to do with debt limits, and there are times when
19 creditors say that the debtor's debts are above the debt
20 limits, and, therefore, the debtor is not eligible, so the
21 Sixth Circuit -- the case is Pearson if you're familiar with
22 it. It says -- it recognizes that at the eligibility stage
23 of a bankruptcy, you don't want to go through the process of
24 fixing claims, but there is this law that sets debt limits,
25 so we have to give it some respect. So the solution it came

1 up with in that context was we're just going to look at
2 whether the debtor in good faith asserts that its debts are
3 below the debt limit. And for those of you who want it, it's
4 773 F.2d 751, 773 F.2d 751, a 1985 case from the Sixth
5 Circuit. Pearson is P-e-a-r-s-o-n. Why not apply a similar
6 standard to eligibility here?

7 MR. GORDON: Because there's no good faith issue
8 here. The question is very simple and can be solved today.
9 Are you going to impair pension -- accrued pension
10 obligations? You can't. The law says so. So put the
11 condition on it today, and we move forward.

12 THE COURT: So your assertion is that it wouldn't
13 even be a good faith argument by the city.

14 MR. GORDON: Doesn't matter what their intention
15 actually is. The condition should be applied today because
16 that is how -- that is the only way a --

17 THE COURT: It wouldn't be a good faith --

18 MR. GORDON: -- political subdivision can avail
19 itself --

20 THE COURT: It wouldn't be a good faith argument for
21 the city to assert that although the Michigan Constitution
22 prohibits it from impairing pensions, it does not prohibit
23 the Bankruptcy Court from impairing pensions. That would not
24 be a good faith argument?

25 MR. GORDON: No, your Honor. I think that that's

1 something that can and should be dealt with today. Let me
2 give an example. What if the only debts of the city today --
3 as we stand here today were pension obligations? Would you
4 say then we should wait and see what happens? We know what
5 would happen. Is it any different because there's other
6 creditors in the room?

7 THE COURT: Well, do we know --

8 MR. GORDON: I haven't --

9 THE COURT: Do we know -- do we know what would
10 happen? Do we know, for example, that there would be no
11 agreed upon negotiation? Do we know, for example, that the
12 state won't fill in the gap?

13 MR. GORDON: Well, let's -- I can talk about that.

14 THE COURT: Now would be the time.

15 MR. GORDON: If you want to talk about that, I'll
16 skip to that. I'll skip to that since that seems to be
17 something that is troubling your Honor or at least on your
18 mind. We have emphasized --

19 THE COURT: A question.

20 MR. GORDON: We have emphasized that the Retirement
21 Systems aren't saying the city can't proceed with a Chapter 9
22 case. It simply must condition the case upon the
23 preservation of the pensions clause. And certainly in some
24 people's minds this begs the question of whether in the event
25 the Court agreed and ruled that accrued pension benefits may

1 not be impaired, could the city still effectively reorganize
2 and restore itself to financial health through a bankruptcy,
3 and while we've indicated that there is still information
4 that we need -- and it's material information -- we continue
5 to do so -- I believe I can stand here today and say that
6 based upon the information that we do have, it is clear that
7 the city can effectively reorganize even if accrued pension
8 benefits cannot be impaired.

9 Just some thoughts and facts for your Honor. The
10 city talks about \$18 billion in debt, but \$6 billion of that
11 \$18 billion is special revenues that are supported by the
12 Detroit Water and Sewer System, so now you really have \$12
13 billion of debt that needs to be supported by the general
14 fund and other cash flows from the enterprise funds and so
15 forth. Of that \$12 billion of debt, roughly half, six
16 billion, is OPEB healthcare actuarially calculated. Another
17 two billion is unsecured bond debt. So fully two-thirds of
18 the \$12 billion of debt is very much subject to restructuring
19 and compromise in bankruptcy. Those are unsecured claims.
20 That's two-thirds of the \$12 billion of debt right there. So
21 there's a tremendous opportunity to unburden the city of the
22 debt obligations -- of these debt obligations and the demands
23 on its cash flow.

24 In addition, although not critical to this position,
25 above the line in the emergency manager's restructuring plan

1 proposed in June is the swap periodic payment, which is
2 soaking up \$50 million a year in casino tax revenues. And as
3 the Court knows -- and, again, I'm not going to argue it
4 here, but, as the Court knows, the Retirement Systems have
5 objected to the treatment of the swaps as secured in those
6 revenues both because the lien is not valid and, even if
7 valid, it does not reach the post-petition revenues. Also --
8 and if it was determined to be an unsecured claim, then you
9 have a \$300 million claim now that is given unsecured status
10 and can also be a compromise in the bankruptcy.

11 Also, it should be kept in mind that we're talking
12 about accrued benefits that need to not be impaired. There
13 are obviously prospective benefits that could be impaired, so
14 there are a number of different ways that the city can
15 achieve real relief from its debts. Obviously it spreads the
16 pain in different directions, but we've -- but by looking at
17 it, your Honor, there is absolutely an opportunity to do
18 something. And when they --

19 THE COURT: Isn't there also a question of fact as
20 to what the underfunded liability is for pensions?

21 MR. GORDON: And let me get to that. It's also
22 critical for the Court to understand that if the Court ruled
23 in our favor and said that there cannot be an impairment of
24 the accrued benefits, that does not mean the Retirement
25 Systems walk away from the table. The Retirement Systems has

1 said that they are committed to working with the city to be
2 part of the solution here. That means a number of things.
3 The city has indicated that it needs to devote significant
4 cash flows in the next five years, according to the proposal
5 in June, \$1.25 billion in the next five years for
6 reinvestment in the city. The Retirement Systems don't
7 object to the concept and understand that the city needs to
8 reinvest, but after that five years, that reinvestment is
9 done. The cash flows of the city become much larger again,
10 and they will improve at five years and the next five years
11 and the next five years. And the Retirement Systems can be
12 flexible because the Retirement Systems issues, the pension
13 issues, are long-term issues. They're not short-term issues.
14 So if there are cash flow issues, the Retirement Systems can
15 work with that. The \$3-1/2 billion number that's been thrown
16 out there is not an amount that is due today if the pension
17 systems are not frozen and closed. That is an actuarial
18 calculation of what will be due over the next 30 years to
19 bring the funding level up to what it needs to be. That's
20 not the amount that is due on a cash flow basis tomorrow or
21 the next day, so there is flexibility there.

22 Also, it should be understood that over time if the
23 economy improves or interest rates rise, and/or, the
24 underfunding level may go up or down, so there's a lot of
25 things in play there, and when you take that all together,

1 we --

2 THE COURT: And I certainly appreciate and commend
3 your clients' willingness to work with the city, but
4 prudentially from the standpoint of ripeness apart from
5 constitutional issues, doesn't that suggest putting off until
6 plan confirmation the issue of the constitutional right?

7 MR. GORDON: Your Honor, again, I would submit that
8 that is conflating eligibility, which is one question, with
9 what can be done under a plan. If this Court does not have
10 jurisdiction because the authorization was not appropriate,
11 if you're putting -- what you're suggesting -- or the city is
12 suggesting is you're putting the uncertainty -- you're
13 putting at risk a state protected benefit in order to
14 leverage people to get in a room and negotiate. And I
15 suggest, as a matter of jurisprudence, that is inappropriate.

16 I wanted to also mention, your Honor, other benefits
17 of a ruling in favor of the concept that the pension benefits
18 cannot be impaired. It, in fact, would help the city in its
19 restructuring in other ways. Absent a ruling on this issue
20 in favor of the nonimpairment of pension benefits, the
21 parties will struggle to negotiate in the shadows of this
22 unresolved issue. What will happen is that the parties will
23 have to negotiate on a dual path against the backdrop of
24 still having these arguments under the pensions clause, under
25 Section 943, and so forth that are all or nothing arguments

1 that would -- if ruled on in a certain way, would come to the
2 conclusion that you can't impair us at all. So it makes the
3 negotiations very difficult, and it also obviously -- as long
4 as that matter is not resolved or if it's not resolved in
5 favor of the pension systems, it becomes -- it makes the case
6 much more litigious and encumbers the entire process. If the
7 Court rules in our favor -- and, again, these are just, you
8 know, some additional thoughts for the Court because I
9 understand the struggle. If the Court rules in our favor,
10 there will be less moving parts for the city to deal with and
11 for the parties to deal with, and it makes the negotiation
12 process much more streamlined. And if at some point in time
13 that decision were reversed and there was a decision that
14 said that the pension clause can be abrogated or impaired in
15 some fashion, having to revise the negotiations at that point
16 and spread the pain around a different way is a lot easier
17 than starting from the other end. If you start from the end
18 that we're at now, it's very hard, again, for the parties to
19 negotiate. And if the -- and if it's determined ultimately
20 that you can't abrogate the pension clause, then you're
21 really going back to square one, and we've lost a ton of time
22 in the negotiation process. We submit that it's much easier
23 to negotiate against a backdrop that says that the pension
24 clause must be upheld.

25 Moreover, a ruling in our favor in that regard helps

1 the city in other ways. It calms the workforce knowing the
2 accrued and prospective accrued pension benefits will be
3 protected. This will enable the city to retain its most
4 talented personnel. In addition, the ultimate commitment of
5 funds to the Retirement Systems as opposed to financial
6 creditors benefits the city because the systems will also
7 invest in the city, as they always have done. And a majority
8 of the pensioners live within the city and pay taxes and
9 consume goods and services in the city, so the Retirement
10 Systems are an economic engine that really is part of the
11 solution for the city, so I want to address all those.

12 THE COURT: Well, but so were the bondholders and
13 the bond investors.

14 MR. GORDON: They don't live in the city, and they
15 aren't putting money back into the city, your Honor. They
16 are not part of that economic engine, and if they get paid
17 their debt service, there's no --

18 THE COURT: Hang on.

19 MR. GORDON: -- guarantee that they're going to
20 reinvest in the city.

21 THE COURT: Didn't I read in the newspaper that the
22 city just got \$350 million?

23 MR. GORDON: I'm sorry.

24 THE COURT: Didn't I just read in the newspaper that
25 the city just got \$350 million to help with its reinvestment?

1 MR. GORDON: No, your Honor. What we read was that
2 there's a proposal to secure unidentified assets at this
3 point but probably to encumber all sorts of assets of the
4 city in order to get \$350 million of which 200 million would
5 immediately go out to pay swap participants who don't deserve
6 to get paid anything as a secured creditor, and then the
7 other 150 million is going to be used in some ways that's
8 been unidentified, so basically you're encumbering assets of
9 the city for purposes that don't benefit the city in any
10 demonstrable way at this time, so I would disagree with that
11 characterization.

12 THE COURT: Okay.

13 MR. GORDON: So, your Honor, for all those reasons,
14 I think that if the Court were to rule, again, as a pragmatic
15 matter, in favor of finding that this case should not move
16 forward without the condition that there cannot be an
17 impairment and that the pension clause must be upheld, it
18 does not mean this case comes to an end by a long -- quite
19 the opposite. In our opinion, it makes this case much more
20 manageable. It makes the negotiations easier. And it, in
21 our minds, provides a much clearer path to a consensual
22 resolution.

23 THE COURT: So you think I can find them eligible
24 and find that pensions can't be impaired? How do I do that
25 because the issue is yes or no, the city is eligible.

1 MR. GORDON: That's correct, your Honor. You would
2 have to -- it would be up to the city to either -- and the
3 state to either agree to -- well, there's a couple different
4 ways.

5 THE COURT: This is the refiling scenario?

6 MR. GORDON: You could either -- you could either
7 rule that the obligation to uphold the pension clause is
8 implied by law because otherwise you don't have valid
9 authorization, there isn't valid state authorization, or you
10 can provide the option to the state and the city to
11 explicitly confirm that process.

12 THE COURT: Oh, I see. So you're saying I can read
13 into the authorization the nonimpairment of pensions even
14 though the governor explicitly rejected that.

15 MR. GORDON: The governor actually didn't. The
16 governor testified that he didn't know whether he had to
17 uphold that, and he decided to choose not to put the
18 condition on it and leave it to the courts, which we suggest
19 is not necessarily appropriate but is --

20 THE COURT: So he rejected the concept of
21 conditioning his authorization on nonimpairment of pensions.

22 MR. GORDON: He did, but he also said he was
23 basically deferring to the courts as to how that should play
24 out, which is ironic because the Webster court has already
25 ruled on that issue.

1 Your Honor, I'll turn to the pensions clause, which
2 is the contracts clause, if I may.

3 THE COURT: Sure.

4 MR. GORDON: The concept that the pensions clause is
5 the same thing as the contracts clause just applying to
6 pensions does violence to the language of the pensions
7 clause, as has already been discussed.

8 THE COURT: Right.

9 MR. GORDON: I won't get into that. Obviously we've
10 pointed out that the pensions clause is more specific and
11 that it was enacted long after the contracts clause and that
12 those things together, as a matter of the canons of
13 construction, would indicate that the pension clause must
14 mean something more and something different from the
15 contracts clause.

16 THE COURT: Right. So what more and what different?

17 MR. GORDON: Well, it starts with looking at why and
18 the environment in which these things were done and looking
19 at the actual language of the two clauses. The contracts
20 clause was adopted back when the government was being formed,
21 and it helps sort of support the structure of the government
22 as it's being developed in terms of federalism and making
23 sure that states don't impair their -- pass laws that impair
24 their own contracts or pass laws that favor their citizens
25 over other citizens. That was the general nature of it. And

1 it's directed, you'll note, to the legislature of the state.
2 The state shall not pass laws that will impair contracts. So
3 that's the contracts clause. Now you fast forward --

4 THE COURT: That's the federal contracts clause.

5 MR. GORDON: And the state, as well as the state
6 contracts clause. So then you fast forward -- I don't know
7 how long -- 150 years to 1963, and you're talking about the
8 constitutional convention and the pensions clause, and what's
9 going on at that point in time? Well, pensions are not being
10 funded. They're underfunded across the state I'm told to the
11 tune of maybe \$600 million, and guess what? Front and center
12 is the City of Detroit that was not paying pensions for its
13 teachers' pensions funds. So the convention decided it
14 needed to do two things.

15 THE COURT: Well, at that point they were also not
16 being treated as contracts; right? They were being treated
17 as gifts I think was the phraseology.

18 MR. GORDON: As gratuities. That's correct, your
19 Honor. So the convention decided it needed to do two things.
20 The convention decided, first of all, to avoid municipalities
21 digging a deeper hole, they were going to put a provision in
22 the Constitution that said that local governmental units will
23 fund their current year's employer contributions in that year
24 to help avoid digging a deeper hole. Secondly, to protect
25 the accrued and unfunded liabilities and to move away from

1 the concept that they are a gratuity, the convention said
2 we're going to call it a contract but not a contract in the
3 sense of a contract but subject to the bankruptcy. I mean
4 there was no -- there was no talk about bankruptcy, nor was
5 there any talk about the contracts clause in this regard.
6 They talked about this is going to be a contract that's in
7 the concept of a solemn binding obligation that will be paid
8 over time, so it is a contract. There's a contractual right,
9 and it shall not be diminished or impaired, meaning it will
10 be paid over time by the state and its political
11 subdivisions. It is absolute. There is no -- there is no --
12 as the attorney general's papers say themselves, there is --
13 it's impermeable unlike the contracts clause, which has
14 developed over time to say otherwise. Now, the difference is
15 in part --

16 THE COURT: But how can the -- how can the state
17 contract -- how can the state promise that given that under
18 the federal Constitution it can't print money?

19 MR. GORDON: It's a matter of insuring that what
20 dollars are available are devoted where they need to be
21 devoted.

22 THE COURT: Suppose there's not enough then.

23 MR. GORDON: I don't know the answer to that
24 question, your Honor, but that's not the issue we have here
25 today. As I've told you, I think that there is enough money

1 here.

2 THE COURT: It's an important issue.

3 MR. GORDON: There is -- I'm sorry.

4 THE COURT: It is an important issue.

5 MR. GORDON: It's an important issue, but --

6 THE COURT: It demonstrates that there's a
7 constitutional right there. It is stated there, but what's
8 it worth? What's it worth? I mean Ms. Levine posed that
9 question. What's it worth if the entity that has the
10 obligation doesn't have the means?

11 MR. GORDON: First of all, I mean every situation is
12 different.

13 THE COURT: Yeah.

14 MR. GORDON: Does it have the means today or will it
15 have the means tomorrow, over time? Musselman, a state
16 Supreme Court case, says, though, that the pension clause
17 cannot be abrogated in the face of financial exigency.
18 That's what it says. If there's a need to amend the state
19 Constitution, then it needs to be amended, but it can't be
20 abrogated by one branch of the government. The will of the
21 people has spoken. The Constitution is a limit, and it
22 circumscribes the power of the government. The government
23 can't say, "Gee, we've got an exigency here. I guess we're
24 going to ignore the state Constitution." It cannot do that.
25 The contracts clause is different, and this is the point --

1 part of the point is there are contracts and then there are
2 contracts.

3 THE COURT: Is there any other constitutional right,
4 state or federal, that is that absolute, any other?

5 MR. GORDON: Sure.

6 THE COURT: And even freedom of the press has its
7 exceptions.

8 MR. GORDON: Well, you know, if you look at even the
9 attorney general's papers, you couldn't -- the legislature
10 can't pass laws that would abrogate freedom of religion,
11 freedom of speech, things of that nature, and it puts the
12 pension clause on the same level. It is absolute in that
13 regard. There are contracts, and there are --

14 THE COURT: We have laws that limit speech. Can't
15 threaten the President; can't yell "fire" in a crowded
16 theater. You can't commit libel.

17 MR. GORDON: So that maybe there's some regulation
18 on the federal level, but this is a state issue. It is an
19 issue that has been -- it is the will of the people of the
20 state.

21 THE COURT: Even the contracts clause has its
22 limits; right?

23 MR. GORDON: Contracts clause does. The reason is
24 different, though. There are contracts, and then there are
25 contracts. And if you look at, for example, you know, some

1 contracts fall under the contracts clause, but the pensions
2 were determined to be different, and that's why you have a
3 pensions clause. That's the whole point of it. The
4 contracts clause recognizes that when you contract with the
5 government, there is an inherent reserve police power to act
6 in the public's welfare, and, therefore, to the extent
7 necessary, in certain situations they can impair contracts.
8 That's the contracts clause. Then you have the pensions
9 clause. It doesn't say that it is subject to the contracts
10 clause. It elevates pensions to a different level, and the
11 reason is fairly clear. If you look at the Musselman case,
12 in particular, again, Musselman says that Michigan
13 governmental -- and I quote. This is from 448 Mich. 503
14 where it talks about the pension clause being absolute and
15 that it -- and it recognizes that the pension clause protects
16 pensions for work performed, so I quote, "Michigan
17 governmental units do not have the option, however, of not
18 paying retirement benefits. Unlike highway construction or
19 police protection, which a governmental unit can choose to
20 receive less of, it is impossible to receive less service
21 from the pensioner. The pension payment is payment for work
22 already completed, or deferred compensation," end quote.
23 What's being referenced there is the complete difference --
24 the relationship between the public employer and labor is
25 different than the relationship between the public employer

1 and a bondholder. A bondholder makes an investment. There's
2 risk involved. That is understood, and that risk is factored
3 into the pricing of the bond. A laborer has -- the
4 relationship with the employer is different. The laborer
5 works. The employer pays. And to the extent that part of it
6 is deferred compensation in the form of a pension, so be it,
7 but it's for -- but what the pension clause protects is
8 accrued benefits.

9 THE COURT: Isn't there an argument that labor takes
10 risks with its employer, too?

11 MR. GORDON: Not in the State of Michigan, your
12 Honor, and I want to emphasize that. Michigan is only one of
13 seven or eight states in the country that has this clause.
14 This is unique to Michigan and the seven or eight other
15 states involved.

16 THE COURT: Excuse me one second. I want you to
17 ignore --

18 MR. GORDON: Oh.

19 THE COURT: No. I want you to ignore that yellow.
20 My staff advises me that Ms. Levine didn't use seven of her
21 minutes, so I'm going to yield them to you.

22 MR. GORDON: Thanks, Sharon.

23 THE COURT: So reset the clock at ten. I assume
24 that's okay with you.

25 MR. GORDON: Yes, absolutely, your Honor. I can't

1 even remember where we were now. Where were we?

2 THE COURT: Oh, I'm sorry. I interrupted your train
3 of thought. Well, take another minute to recollect --

4 MR. GORDON: Oh, yes. I think I finished that
5 point, I suppose. It really is that, you know, some contract
6 rights are just contract rights, and other contract rights do
7 rise to the level of property rights, and that's in the
8 United States Trust Company of New York versus New Jersey,
9 the Supreme Court case, 431 U.S. 1. In Michigan AFT Michigan
10 versus Michigan, 297 Mich. App. 597, the Court held that
11 withheld salary of public school employees constituted the
12 taking of property in violation of substantive due process
13 and the takings clause, so there are relationships,
14 contractual relationships relative to accrued benefits for
15 labor, pension obligations, that are treated as property.

16 THE COURT: Is there a State of Michigan case that
17 holds that pension rights are property rights?

18 MR. GORDON: Well, this relates to salary of public
19 school employees. I don't know --

20 THE COURT: Right. So I was asking you about
21 pensions.

22 MR. GORDON: About pension obligations specifically?
23 I would have to check on that, your Honor, but I believe that
24 there are pension cases in the state that talk about pension
25 rights as property, including in such a situation, as you can

1 imagine, as divorce settlements. There are pension
2 obligations that become property that get part of a property
3 settlement even, but that's just one example, but I can get
4 you --

5 THE COURT: Well, we have to be careful here because
6 a contract right is in the bundle of property rights. Every
7 contract is property of the parties to the contract; right?

8 MR. GORDON: Yes, your Honor. I'm not sure that all
9 contract rights rise to the level if they're abrogated of a
10 taking, but here vis-a-vis the pension --

11 THE COURT: Right. That's exactly the point.

12 MR. GORDON: That's right, but the pension clause --

13 THE COURT: So when the federal, you know,
14 Bankruptcy Court discharges creditors' contract rights
15 against debtors, which we do all day every day, we're not
16 taking the creditors' property rights even though we are
17 discharging those contracts or if we are it's not a Fifth
18 Amendment violation; right?

19 MR. GORDON: True. By the same token, there are
20 other property rights that are determined under state law
21 that -- cases such as Butner and Travelers respect the state
22 law property interest, and it flows through the bankruptcy.

23 THE COURT: Right, but the point is that it has to
24 be a property right under state law over and above what would
25 be the contract right, like, for example, a security

1 interest.

2 MR. GORDON: Or a state constitutionally protected
3 right that is impermeable we would submit, your Honor.

4 THE COURT: Okay.

5 MR. GORDON: It's like a nondischargeable debt, your
6 Honor, and it doesn't mean that it can't be dealt with in a
7 way that doesn't impair it but gets dealt with in a way that
8 is -- you know, provides some flexibility for the
9 reorganizing entity, but it's a nondischargeable debt.

10 THE COURT: Well, nothing in Chapter 9 provides for
11 any nondischargeable debts, is there?

12 MR. GORDON: I'm stating it by analogy, your Honor,
13 obviously.

14 THE COURT: Okay. All right.

15 MR. GORDON: By putting the condition on that you
16 can't impair, it becomes a nondischargeable debt essentially,
17 and the state has that authority to place the appropriate
18 conditions on the filing of the bankruptcy to protect the
19 statutory structure. And it's not just statute. I mean this
20 is -- the difference here again, this is really unique. It's
21 not like California or Alabama.

22 THE COURT: Hypothetically, a state legislature
23 passes a law authorizing municipalities to file Chapter 9 so
24 long as the plan provide -- the municipality's plan provides
25 for a priority of payment, and it turns out that that

1 priority of payment legislatively required by the state
2 legislature is different from the Bankruptcy Code. Let's
3 assume that. Would it be your position that no municipality
4 could file Chapter 9 in that case because the state law
5 contravenes the superior -- or the supreme federal law?

6 MR. GORDON: Well, that's an interesting question
7 because it sounds more like one of those situations where
8 once you're in bankruptcy, you have to accept the structure
9 of the Bankruptcy Code itself, and that highlights --

10 THE COURT: That's exactly what the city is arguing
11 here.

12 MR. GORDON: And that highlights the point here that
13 eligibility has to be dealt with at the eligibility stage and
14 that -- and to put off the question of whether you can impair
15 the pension clause leads to those vagaries of questions
16 about, "Well, now we're in bankruptcy. Does the Bankruptcy
17 Code have vitality and in what regard?" No. You don't get
18 to those questions unless you have valid state authorization.
19 You don't have valid state authorization unless you've taken
20 into account what provisions need to be there to protect the
21 state Constitution and other statutes, and that's sort of
22 what Harrisburg talks about. You may have facial authority
23 under one statute, but you got to look at the other statutes.
24 And in here in this case it's --

25 THE COURT: So in my hypothetical you would say

1 there's no valid authorization.

2 MR. GORDON: I would say that the state may be very
3 disappointed if it authorizes and allows the debtor into
4 bankruptcy only to find that the -- that part of the
5 protection goes away.

6 THE COURT: It's hard for me to be concerned about
7 how the state feels. Is it your position that there would be
8 no authorization, no proper authorization in that case?

9 MR. GORDON: Let me understand the hypothetical
10 then. I know time is short. The hypothetical is that the
11 state would pass a statute that says that you can file
12 Chapter 9, but the priority of payments is going to be --

13 THE COURT: But here are the priorities. Here are
14 the priorities. You got to pay bonds first, and, you know,
15 you got to pay --

16 MR. GORDON: Perish the thought.

17 THE COURT: Sorry?

18 MR. GORDON: Perish the thought, but go ahead.

19 THE COURT: Okay. Perish the thought all you like,
20 but this is the hypo.

21 MR. GORDON: Yes.

22 THE COURT: You got to -- you pay the bonds first,
23 and you got to pay trades, and then you got to pay employees'
24 wages, and then you pay pensioners last, and understand,
25 everyone who's listening to this, this is strictly

1 hypothetical. It's inconsistent with the Bankruptcy Code.
2 I'm sorry.

3 MR. GORDON: I forgot about the overflow. Sorry.

4 THE COURT: Well, and this is being recorded.
5 Anyway, it's inconsistent with the Bankruptcy Code. However,
6 whatever hypothetical you create, and the governor says, you
7 know, "We've got to comply with state law. I'm authorizing
8 this bankruptcy, but the municipality's plan has to comply
9 with the state law that sets forth these priorities." Is
10 that a proper authorization or not?

11 MR. GORDON: I would say not.

12 THE COURT: Okay.

13 MR. GORDON: Well, it's --

14 THE COURT: Now you're saying that when state law
15 says the priority has to be given to pensions --

16 MR. GORDON: Well, let me back up.

17 THE COURT: -- that's not proper if it's
18 inconsistent with the Bankruptcy Code.

19 MR. GORDON: Actually, I would say -- no. I would
20 say that the authorization is proper, but, again, a portion
21 of that authorization is actually going to come into conflict
22 with the Bankruptcy Code itself, so I think it's just a
23 flawed concept. So if you had that provision in there, I --
24 you know what? The difference is -- let me think about this.
25 I think the difference is the cases such as Vallejo and

1 others dealt with situations where someone tried to cherry
2 pick various provisions of the Bankruptcy Code after they got
3 into bankruptcy. It didn't involve the actual state
4 authorization. So here I think if you were presented with
5 that, you would have two choices. You would either have to
6 acknowledge that state authorization as is and agree to that
7 structure and say that will supersede the Bankruptcy Code
8 because that's the only way the state is allowing you to get
9 into bankruptcy, or you would have to dismiss the case.

10 THE COURT: Which should I do?

11 MR. GORDON: In that situation, I think you would
12 give the state the opportunity to decide, but in the first
13 instance, if the state doesn't do anything, you would have to
14 dismiss that case because you don't have the authority to
15 amend the Bankruptcy Code.

16 THE COURT: I would have to give them the
17 opportunity to revise the authorization?

18 MR. GORDON: That's correct, your Honor. They'd
19 either have to amend the --

20 THE COURT: How could --

21 MR. GORDON: -- authorization or understand that if
22 they go into --

23 THE COURT: How could the governor provide an
24 authorization that's inconsistent with the state statute?

25 MR. GORDON: He couldn't. He would either have to

1 go back and --

2 THE COURT: What's there to revise?

3 MR. GORDON: -- change the statute -- he'd either --
4 he has two choices.

5 THE COURT: Oh, go back and change the statute.

6 MR. GORDON: There are two choices. Either the
7 Court agrees to allow the case to go forward with that
8 structure because that's the only way the state will
9 authorize it and that's what 109(c)(2) talks about, or if
10 this Court for some reason believes that that is in conflict
11 with the Bankruptcy Code, then this -- I guess I don't know.
12 The state could either -- the state would have to go back and
13 amend its statute in some fashion. I don't really know, but
14 I think that if the state --

15 THE COURT: Or if it's constitutional, amend its
16 Constitution?

17 MR. GORDON: Wait. What couldn't be done is that
18 this Court could not accept the authorization and then say,
19 "I'm cherry picking. I'm not allowing that part of the state
20 statute to stand because that is the only way that they got
21 into bankruptcy in the first place." That's my answer, your
22 Honor. All right. Can I move on?

23 THE COURT: You can.

24 MR. GORDON: We're really out of time here probably,
25 I notice, in a minute, but I just wanted to touch upon

1 collateral estoppel because I promised I would unless your
2 Honor has a different --

3 THE COURT: No, no. You argue what you like.

4 MR. GORDON: As far as collateral estoppel is
5 concerned, your Honor, the city and the state have argued
6 that there was not a full fair opportunity to litigate in the
7 Webster matter. We've addressed that in our papers. We
8 believe that that is not accurate. There was full briefing.
9 Both sides filed cross-motions for summary disposition, so
10 they addressed the merits of the matter. The Court
11 acknowledged that there had been briefing and oral argument
12 before it entered its order. The city and the state also
13 argued that there was no privity between the city and the
14 defendants in Webster, but on September 19th, your Honor, the
15 city argued in this court that there was a common interest
16 agreement between the city and the state and that there was
17 common interest with respect to the financial situation of
18 the city and the bankruptcy, so privity is certainly there.
19 And then finally the city and the state argued that the state
20 court doesn't have authority or jurisdiction to rule on
21 eligibility issues. The Webster court didn't rule on
22 eligibility issues. It doesn't mention 109(c)(2) of the
23 Bankruptcy Code. It merely ruled on the interplay between
24 two state statutes, PA 436 and the pensions clause, and ruled
25 that those two had to be harmonized and that, therefore, any

1 authorization of a bankruptcy under PA 436 must comport with
2 the pensions clause or otherwise it was unconstitutional, so
3 it did not infringe on this Court's jurisdiction in that
4 regard. So we think that collateral estoppel is valid and
5 applies here under the Webster judgment.

6 THE COURT: Thank you.

7 MR. GORDON: Thank you, your Honor.

8 MS. CECCOTTI: Good afternoon, your Honor. Babette
9 Ceccotti for the UAW.

10 THE COURT: Good afternoon.

11 MS. CECCOTTI: And with admittedly some trepidation,
12 I am also going to cover the authorization under state law,
13 and I think -- I guess I'd like to start with just a couple
14 of threshold comments. First, I think the exchange that
15 you've had with Mr. Gordon and perhaps with others -- and I'm
16 sure it's not going to be limited there -- will probably lead
17 you to conclude that at least some of the issues that you've
18 slated as purely legal will -- are better served awaiting the
19 outcome of the trial. I'm just -- you know, Mr. Gordon took
20 you through a series of numbers. There are all kinds of
21 facts and information that are probably best developed
22 through the evidentiary record, and that may well inform your
23 Honor's views of a number of the questions that you've asked
24 here today so far, so I'll just start with that observation.
25 I'd like to just, if I might, also --

1 THE COURT: Well, just so the record is clear -- and
2 I may have indicated this before even perhaps in writing --
3 it's certainly not the Court's intention to rule on these
4 issues before the trial, and to the extent any of the facts
5 that come out at trial bear on these, sure, they'll be taken
6 into account.

7 MS. CECCOTTI: Thank you, your Honor.

8 THE COURT: But I did hold out to all of you that
9 one of the purposes of today's hearing was to see whether
10 there are any genuine issues of material fact in advance of
11 the trial so that you can address those at the trial, and I
12 intend to do that.

13 MS. CECCOTTI: Thank you, your Honor. I guess
14 the -- let me just interject another thought into the
15 exchange that you had with Mr. Gordon on your hypothetical, a
16 couple of thoughts. First, the -- and I will -- I'm going to
17 start and go through this in a little more organized way, but
18 I just wanted to make sure I get this point out. It's
19 important to keep in mind that as inviolable and as absolute
20 and as definitive as those of us on the objectors' side
21 believe the pension clause is and as much as we believe that
22 it was the right of the citizens of the Michigan -- of
23 Michigan to so provide in adopting it, remember that we are
24 here in the public sector. We are not in the private sector
25 where there is a federally regulated and federally

1 established pension insurance system so that when plans get
2 underfunded, when plan sponsors are overburdened, there is a
3 system that takes over. And I would have to say all --
4 certainly the lion's share of the decisions that have come
5 down on this topic arise because of the -- because of the way
6 that that system is constructed. There's a federal agency
7 that provides a safety net. You know, there are moral hazard
8 issues. There's a whole balancing that goes on in that
9 system. We don't have that here. Michigan pensioners have
10 Article IX, Section 24. That's it. That's what they have.
11 So as, you know, perhaps a -- it might take a bit of a leap
12 to see that that section means what it says and really,
13 really, really means what it says, I think it's important to
14 bear in mind that that is a safety net for pensions for
15 Michigan pensioners. Okay.

16 So, now, to try to get back a little bit towards
17 more of an organized progression here on the 109(c)(2)
18 issues, the governor, as we've been discussing, had issued
19 the letter of authorization -- the letter of authorization
20 without any contingencies, so I think it's in -- and your
21 Honor asked the question this morning -- a couple of
22 questions this morning that have to do with, you know,
23 where's the impairment and where's the harm and questions of
24 that nature, and why wasn't the governor's reference to 943
25 sufficient. So I think what's important to do first is take

1 a look at -- briefly just take a look at the authorization
2 letters. And, again, this is without reference to any
3 testimony or anything else that you're going to hear next
4 week. You know, just looking at the letters that were
5 attached to Mr. Orr's declaration, the July 16th
6 authorization makes quite plain in his situational
7 overview -- he says for an extended period of time, the city
8 has simply failed to make the investments required to provide
9 its residents with an adequate quality of life as limited
10 resources have been diverted elsewhere. He says the city's
11 urgent need to address large and growing legacy liabilities
12 and other substantial debts is self-evident. Failure to
13 address these liabilities will prevent -- excuse me --
14 prevent the city from devoting sufficient resources to
15 providing basic and essential services to its residents.
16 Indeed, significant additional resources are required to
17 improve health and safety. And he goes on to say that the
18 city must devote a larger share of its revenues to
19 effectively providing basic essential services to current
20 residents, attract new residents and businesses to foster
21 growth and redevelopment, ultimately begin -- and ultimately
22 begin what will be a long process of rehabilitation and
23 revitalization for the city. The city's debt and legacy
24 liabilities must be significantly reduced to permit this
25 reinvestment. Plain as day in Mr. Orr's letter. He

1 incorporates his entire proposal, the -- I don't have the
2 whole thing here. I've just got some of it. This is the
3 June 14th proposal. Goes to the governor, and the governor
4 writes back again providing the authorization and saying in
5 part that he's reaffirming his confidence that Mr. Orr has
6 the right priorities when it comes to the City of Detroit. I
7 am reassured to see his prioritization of the needs of
8 citizens to have improved services. I know we share a
9 concern for the public's -- for the public employees who gave
10 years of service to the city and now fear for their financial
11 future in retirement, and I'm confident that all of the
12 city's creditors will be treated fairly in this process. We
13 all believe that the city's future must allow it to make the
14 investment it needs in talent and infrastructure all while
15 making only promises it can keep. So I think it's very clear
16 from these letters -- excuse me -- as it is abundantly clear
17 from the proposal that the city is proposing to take
18 resources from what it's calling the legacy liabilities or,
19 fill in the blank, accrued pensions, and divert those
20 resources to the list that Mr. Orr has laid out here,
21 reinvestment and services and the like, so when we talk about
22 not impairing the pensions and who took what action and when
23 does the impairment happen, the governor's letter, we submit,
24 in fact, is the impairment because it has -- the governor is
25 stating that he is acknowledging Mr. Orr's priorities,

1 including the priorities to take money from the pensions and
2 use them to pay other things. And so when the pension clause
3 talks about -- excuse me. I'm sorry. I just lost my brief.
4 I apologize, your Honor. I think I -- I have it. So when we
5 talk about the text of Article IX, Section 24, "The accrued
6 financial benefits of each pension plan and retirement system
7 of the state and its political subdivisions shall be a
8 contractual obligation thereof which shall not be diminished
9 or impaired thereby," and we look and we are -- we see that
10 among the records in the constitutional convention is the
11 explanation that Article IX, Section 24, quote, "requires
12 that accrued financial benefits of each pension plan and
13 retirement system of the state and its political subdivisions
14 be a contractual obligation which cannot be diminished or
15 impaired by the actions of its officials or governing body,"
16 the impairment occurs when the governor signs this
17 authorization with no contingencies. That's when it happens.
18 So not impairing thereby, meaning -- means very specifically
19 this document, and the "this" I'm holding up here now is the
20 governor's consent. Now, why is --

21 THE COURT: Oh, but this raises two questions.

22 MS. CECCOTTI: Sure.

23 THE COURT: Is there a scenario in which the city
24 would have the ability to meet its pension obligations in the
25 very long term unless it makes the kind of investments that

1 Mr. Orr and Mr. Snyder have suggested should be part of the
2 city's priorities? That's question number one. Question
3 number two is actually a much more important question, and
4 that is is question number one a question for now, or is it a
5 question for plan confirmation?

6 MS. CECCOTTI: It is absolutely a question for now
7 because --

8 THE COURT: What's the answer then? How can the
9 city maximize its chance of paying its pension obligations
10 unless it makes the kind of investments that Mr. Orr and Mr.
11 Snyder are talking about?

12 MS. CECCOTTI: It may be that the investments
13 themselves or the idea for the investments is fine. The
14 question is can it get there lawfully by taking money from
15 pensioners? That is the question that the state Constitution
16 answers by saying no. Now, as Mr. Gordon pointed out or as I
17 think is evident from his presentation, there's a lot of
18 numbers here, Judge. There were numbers in Mr. Orr's
19 request, his July 16th request. You're going to hear an
20 awful lot about those numbers and what they are and what they
21 are not, so I would suggest that the notion that we somehow
22 have already today, quote, no reasonable alternative in the
23 words of PA 436 I would suggest very much should await your
24 Honor's review of the evidence on all of that, so --

25 THE COURT: Okay.

1 MS. CECCOTTI: I realize it's a question that has
2 been on your mind all day, but I really think unless you
3 really want us up here freelancing numbers -- and you really
4 don't -- that it is best to simply --

5 THE COURT: I'll grant you that one.

6 MS. CECCOTTI: Right; right. But I guess my point
7 is the answer cannot be because the problem seems hard, we're
8 just going to try to find a way to say perhaps that this
9 language doesn't mean what it says because I think once you
10 start down that road, you run into all kinds of problems.
11 You run into the Chapter 9 dual sovereignty problems. You
12 run into problems of who gets to decide what, right, whether
13 this Court gets to construe Article IX, 24, to, in fact, say
14 it can be invaded. These are problems that are simply too
15 thorny -- certainly too thorny to start with, and maybe we'll
16 see where your Honor is after the evidence.

17 Okay. So why isn't the reference to 943(b) enough,
18 and I think -- and I think you've heard it, but just to say
19 it again and hopefully crystalize it a bit, I think the
20 governor assumed in wording the letter the way that he did
21 that somehow this all gets sorted out, and I think that seems
22 to be a lot of the presumption here, and I must say I am not
23 in full company with those who say that once you cross the
24 threshold of 109(c) using state law that somehow you can
25 start, you know, running around employing federal supremacy.

1 I think that that -- we'd probably have a lot more
2 conversations about that with a lot more time with a lot more
3 specificity before we get there. We think -- and we spent a
4 bunch of time on this in our brief, Judge, and given your
5 handling of the Addison case you probably didn't need all of
6 this, but our view is that you must look -- in order for
7 Chapter 9 to be constitutional, you have to look at all of
8 these pieces that import or give recognition to the state
9 law. Just to take you back to another colloquy that you had
10 with Mr. Gordon and why I think maybe that the Chapter 13
11 example isn't a good fit here, 109(c) says that an entity may
12 be a debtor under Chapter 9 if and only if such entity is
13 specifically authorized to be a debtor under such chapter by
14 state law. So while we're all here today obviously under
15 109(c) and 109(c) is in the Bankruptcy Code and so you're
16 right -- the law that must be applied is state law, and the
17 Court decides whether -- you, the Court, you, the Bankruptcy
18 Court, decide under 109(c) whether, in fact, the municipality
19 is specifically authorized to be a debtor under Chapter 9 by
20 state law or by a governmental officer empowered by state
21 law. And so I think that that may help to distinguish the
22 Sixth Circuit case that you discussed with Mr. Gordon, but it
23 also points out that getting through the door is a state law
24 question. 903 and 904 are obvious limitations on the Court's
25 authority. 943 is a limitation on the plan. All of these

1 things work together, and I think your Honor's opinion
2 actually in the Addison case on the motion to intervene was
3 exactly right in recognizing the limitations not only of the
4 Court's caution in addressing the questions precisely because
5 of the questions that 903 -- the issues that 903 and 904
6 import into the bankruptcy process, but another observation
7 which takes me back to the letters and the taking of the
8 money from the pensioners and putting it towards something
9 else, which is, I think, your court -- your observation in
10 that case that Chapter 9 is about debt adjustment and should
11 not be overburdened I think applies very well here, too, and
12 I think, again, when we get to the trial and the full array
13 of the plan and everything else comes out and we start
14 talking about that in the evidentiary context, I think that
15 it is at least a question as to whether or not this issue
16 that we're all talking about here is in a narrow sense debt
17 adjustment or whether it is more than debt adjustment and
18 whether that shouldn't inform the Court's caution in ensuring
19 that the state law is being adhered to.

20 And I guess -- and I don't often get to the point of
21 imploring at the podium. It's not always pretty, but I'm
22 going to break my rule on this whole subject of where is the
23 impairment. To me it's like a shell game. Okay. Under
24 which of these cups is the impairment; right? Is the
25 impairment -- I've told you where I think the impairment is;

1 right? I don't think the Court impairs. The debtor proposes
2 the plan. Under Chapter 9 only the debtor can propose the
3 plan. The debtor was supposed to have come up with something
4 that passes muster to meet the 109(c) criteria in advance of
5 getting to this point, and they --

6 THE COURT: Well, but the proposal of a plan, the
7 filing of a plan which proposes to impair pensions doesn't
8 result in the reduction of anyone's pension check any more
9 than the filing of the case did.

10 MS. CECCOTTI: Your Honor, I --

11 THE COURT: That doesn't happen until the Court
12 confirms it under law.

13 MS. CECCOTTI: And, your Honor, then why are we
14 talking about it? Why are we talking about it?

15 THE COURT: Answer that question.

16 MS. CECCOTTI: If it hadn't been --

17 THE COURT: I'm having my issues with that very
18 question. Why are we talking about it?

19 MS. CECCOTTI: We're talking about it because it's
20 in their proposal. We're talking about it because it was in
21 the authorization that went to the governor. We're talking
22 about it because the governor clearly recognized it or at
23 least recognized it sufficiently to draft the letter that he
24 did. We're talking about it because despite weeks and weeks
25 and weeks, no one has disabused the pensioners of the notion

1 that their pension rights are -- that they are intending to
2 impair their pension rights. That's why we're talking about
3 it. It simply does not -- here they are in Chapter 9; right?
4 They're in Chapter 9. They've got the benefit of the
5 automatic stay. They've gotten their stay against the pre-
6 petition lawsuits. They want to have a bar date motion.
7 They're getting all of the -- you know, all of the features,
8 right, of Chapter 9. And the threshold question that has to
9 be asked is can they be here, and the threshold question can
10 only relate to the form in which they show up on the court's
11 doorstep. And the form in which they show up on the court's
12 doorstep is the June 14th proposal, which is abundantly clear
13 on the subject of invading -- impairing accrued pensions.
14 What else would the Court -- what else would we be dealing
15 with? What else would your Honor be dealing with if not for
16 the fact that they evidenced their plan?

17 THE COURT: I think the answer to that question may
18 be the governor's authorization. He says we are here to
19 adjust the city's debts in conformity with law.

20 MS. CECCOTTI: He says that at that end we do that,
21 but what does it mean -- what is supposed to go on before we
22 get there? It can't be that we have a sort of quasi eligible
23 debtor going through all of the -- you know, using all of the
24 processes I just described and then we have a big
25 conflagration at the end. I mean it just --

1 THE COURT: Why not?

2 MS. CECCOTTI: Chapter 9 presupposes through the
3 front door under state law, specially authorized under -- by
4 state law. That is what 109(c) says. It is plain as day.
5 And state law means state law, and it requires giving -- if
6 they hadn't put in this -- the pages --

7 THE COURT: So in response to my question to Mr.
8 Gordon, you would say that if state law requires a different
9 priority scheme than the Bankruptcy Code, the municipality is
10 eligible only if the Court is willing to enforce that state
11 law priority scheme rather than the Bankruptcy Code priority
12 scheme?

13 MS. CECCOTTI: I think that I would say that if a
14 state legislature -- we're not talking about the Constitution
15 here. You're just talking about, in effect, the PA 436 of
16 whatever that state is. I would say that those are the
17 terms. We have -- we allow the states -- states have a
18 variety of authorization. Some of them have no
19 authorization. It is a state-by-state --

20 THE COURT: Every bankruptcy case that has addressed
21 that question has held the other way, hasn't it?

22 MS. CECCOTTI: Well, I don't know the answer to
23 that, your Honor. In the Chapter 9 context?

24 THE COURT: Yes, in the Chapter 9 context.

25 MS. CECCOTTI: Okay. Well, I --

1 THE COURT: Every Bankruptcy Court has held once
2 you're in the door, it's the Bankruptcy Code priorities that
3 apply, not the state law priorities --

4 MS. CECCOTTI: Right. Well, right. And now we're
5 getting into the --

6 THE COURT: -- because the state consents to the
7 Bankruptcy Code or it doesn't.

8 MS. CECCOTTI: Well, and I would say that a state
9 that passes a law such as your Honor proposed maybe, in fact,
10 looked at those cases and said, no, we don't really want to
11 go there. We want to -- you know, we'll let you go if it's
12 this other way. I think the through the door -- once we're
13 in the door -- I know what Harrisburg says. You know, I have
14 a lot of trouble with it just because I think that the
15 doctrine has not evolved in a sufficiently precise manner.
16 You don't always see what the conflict is. You have to come
17 up with notions of what the purpose is. Remember the ancient
18 Supreme Court cases here said bankruptcy is about discharge;
19 right? So can states have discharge laws? So we're way, way
20 far away from that now, so I think -- again, I think we'd
21 have to have a lot more conversations about what happens
22 through the door. Right now we're talking about you're at
23 the door, and you're at the door, and you're presenting
24 yourself, and what you're wearing, right, is something that
25 says we are going to violate Article IX, Section 24.

1 Just want to see if there is anything -- see if I've
2 left anything out here that I wanted to cover. I have some
3 minutes here. I guess I could barter away my minutes, Judge,
4 or I could give them to you to barter them away. Let me just
5 take a quick moment here. I think -- I mean, again, I think
6 we're going to get to the point of duplication if I continue
7 unless, your Honor, you'd like to ask me anything else. I
8 think I've hit the points I wanted to hit.

9 THE COURT: Okay. Thank you.

10 MR. WERTHEIMER: William Wertheimer, your Honor, on
11 behalf of the Flowers plaintiffs. As I'm sure your Honor
12 will recall, although it seems like ages ago now, the Flowers
13 plaintiffs were plaintiffs in one of the state court cases
14 that preceded the bankruptcy, a state court case in which we
15 were making the claim that under state law the governor was
16 required to recognize Article IX, Section 24, if and when he
17 authorized a bankruptcy. I'm not here to speak on bankruptcy
18 law. When I heard the reference to Asbury Park, I thought of
19 the street in northwest Detroit. I'm not a bankruptcy
20 lawyer.

21 THE COURT: Okay.

22 MR. WERTHEIMER: I just want to speak briefly on the
23 state law, which it was my understanding at the stay
24 proceedings everybody kind of understood, including the city
25 attorneys, that although our claim was being delayed, it was

1 not being changed in terms of its nature; that is, that this
2 Court would decide as a matter of state law whether this
3 bankruptcy was properly authorized. It was just that the
4 forum was changing.

5 And I'd just like to make three points as to that
6 state law, three areas where I think this Court can look to
7 what it should do in deciding what I believe is that state
8 law issue; that is, the basic eligibility issue. If you look
9 at the equivalent of legislative history of Article IX,
10 Section 24 -- that is, the constitutional convention
11 record -- there is certainly references to the fact that has
12 been mentioned here today that it was meant in part to deal
13 with the fact that pensions had been considered not to be a
14 matter of contract, but the only specific reference that I
15 found in that record -- and no one has cited anything to the
16 contrary -- is the comment of Mr. Van Dusen, which I -- with
17 the Court's permission, I'll take the liberty to quote. It's
18 not long. "An employee who continues in the service of the
19 public employer in reliance upon the benefits which the plan
20 says he would receive would have the contractual right to
21 receive those benefits" -- he didn't stop there -- "and" --
22 he didn't say "meaning" -- he said "and," in addition -- and
23 I think this goes to what Mr. Gordon was getting at, "and
24 would have the entire assets of the employer at his disposal
25 from which to realize those benefits." That was the

1 understanding of Mr. Van Dusen. There's no contrary
2 understanding on the record as to what the idea was on behalf
3 of the people who were writing Article IX, Section 24.
4 That's point number one, and I think if you look at what
5 Emergency Manager Orr did in his June 14th proposal, Mr. Van
6 Dusen, were he alive to take a look at it, would say, "That's
7 not what I meant," because on June 14th what Mr. Orr proposed
8 and he continues to propose is the retirees get treated like
9 any other creditor. He didn't say words to the effect of
10 "all the assets of the employer," so that's the first piece
11 of state law in the broad sense of the term that I think you
12 can look to.

13 The second piece is the Webster and the Flowers
14 cases and the retirement case. And I'm not repeating
15 Mr. Gordon's argument relative to collateral estoppel or the
16 res judicata argument. I'm simply pointing out that as --
17 excuse me -- as Mr. Gordon indicated, that case was fully
18 briefed, and a state court judge looked at the exact issue --
19 well, maybe not exact but very close to the issue that is in
20 front of you, and that state court judge, after full
21 briefing, decided that in a manner consistent with our
22 position. And I would point out there is no contrary law
23 anywhere. I recognize this Court -- the cases that say you
24 look to the definitive ruling from the highest state court
25 and all that, but Judge Aquilina's decision -- decisions,

1 well-reasoned, are all that's out there. She's a state court
2 judge deciding this issue. That's the second piece of state
3 court law that, as far as I can tell, is out there.

4 There's one other, and that is we have the state
5 attorney general. This isn't law, but the state attorney
6 general enters an appearance a little late in the game. The
7 governor has already authorized the bankruptcy. However, the
8 state attorney general, as an officer of the state, as the
9 chief legal officer of the state, tells this Court that
10 Article IX, Section 24, binds the emergency manager in
11 bankruptcy. Now, we all know that that gets into the issue
12 of is it at the eligibility stage or the plan stage, and I --
13 that's been dealt with. My point is simply that a state
14 officer, the attorney general of the state, saying that the
15 emergency manager in bankruptcy is bound by Article IX,
16 Section 24, is consistent and supports our position that the
17 governor, when he goes to authorize that bankruptcy, is also
18 bound by Article IX, Section 24. And with all due respect to
19 the governor, we think it's up to this Court to hold the
20 governor to that.

21 THE COURT: All right. Thank you, sir.

22 MR. WERTHEIMER: Thank you.

23 MS. PATEK: Good afternoon, your Honor. Barbara
24 Patek on behalf of the Detroit Police Command Officers
25 Association, the Detroit Police Lieutenants & Sergeants

1 Association, the Detroit Police Officers Association, and the
2 Detroit Fire Fighters Association defined in this case as the
3 Detroit Public Safety Unions. As the Court is aware, these
4 are the men and women who provide the police and fire
5 protection that are essential to the survival of the city,
6 and these are exactly the essential services that Chapter 9
7 was designed to preserve and protect.

8 I want to use my time this afternoon to talk a
9 little bit about ripeness, talk very briefly about the
10 supremacy clause and the tension between the supremacy clause
11 and the Tenth Amendment, and then to try to answer some of
12 the questions that the Court has raised with some of the
13 other objectors today.

14 On the issue of ripeness and why this is a question
15 for eligibility, I think that goes to the very nature of
16 Chapter 9, which precisely because of the sovereign immunity
17 and the sovereignty of the State of Michigan, this Court, as
18 it's recognized in so many hearings, is limited in what it
19 can order the city to do. In that respect, this -- not that
20 every bankruptcy isn't a consensual process and not that
21 every bankruptcy doesn't involve a lot of negotiating.
22 Chapter 9 is unique because it incorporates -- it's a largely
23 consensual process at some level precisely because this Court
24 cannot trump the state's sovereignty in particular
25 situations. And in that regard, if one talks about imminent

1 harm, there is -- you know, it's in the record. Mr. Gordon
2 alluded to the fact that the stay authorized the city to come
3 in this court for a very public purpose, and that purpose was
4 to impair the accrued vested pension rights of its public
5 servants. That question, as the city points out in its
6 papers, no court has ever said they can't do it, and no court
7 has ever said they can. It's an unanswered question. We're
8 entitled to know what our rights are, and to suggest that by
9 knowing what our rights are in the door that is to knowing
10 what -- to know what the proper authority is here would
11 somehow skew the process or cause people to walk away from
12 the table I think is wrong. This is a hard question that the
13 Court has to answer, but the Court is here to follow the law.
14 I think this is -- there is imminent harm to these
15 individuals here, and there's a second piece of that by
16 virtue of the vacuum in which there's no legal precedent on
17 this issue, and that is -- I'm just going to throw out to the
18 Court the idea that this is one of those issues where it's
19 capable of repetition but evading review. If every time this
20 gets kicked down the road to confirmation, nobody is ever
21 going to know what their rights are when this issue comes up.
22 I submit that Michigan is a little bit unique, but I think
23 that there are plenty of reasons that this issue is ripe for
24 adjudication today.

25 I'd like to take a crack at some of the questions

1 that the Court raised. You raised the issue of what if the
2 state law requires a different scheme of priorities than is
3 authorized by the Bankruptcy Court. I think if you step out
4 of the weeds on that question and I think you look at what
5 the Code says here, the state has to give its consent to come
6 into Chapter 9. And in giving its consent, the state agrees
7 to certain provisions of Chapter 9. I think a state that
8 authorizes such a scheme simply can't give its consent to
9 come into Chapter 9. I think that's the simple answer to
10 that question.

11 THE COURT: So your answer then in that hypo would
12 be not eligible?

13 MS. PATEK: Correct. I also think -- the Court
14 asked the question and raised the 11th Amendment, and I'm
15 going to go out on a limb here on this and the question of
16 sovereign immunity because I think the answer to a lot of the
17 issues before the Court and whether or not, in fact, the city
18 can impair these rights or use the Court to impair those
19 rights is in some ways answered by the Code. Section 106 of
20 the Code addresses the sections of the Code under which the
21 state waives its sovereign immunity. 109 is not one of them,
22 and I think that makes the eligibility issue as it's framed
23 by 109 a question of state law. And the other place, if
24 we're going to jump ahead to where we'll be down the road,
25 where the state does not waive its sovereign immunity is

1 under Section 943. We know there are some places where to
2 consent to come into this Court and get relief the state has
3 to agree to conform to the rules. 365 is one of those that
4 you've got Bildisco. If you're going to come in and you look
5 at -- that's a place where the state has to agree, consent to
6 be governed by the federal rules. The other place is the
7 automatic stay. But when you get down the road to the plan
8 that only the city can propose, the state does not waive its
9 immunity, and that --

10 THE COURT: I think you might be overanalyzing my
11 question about sovereign immunity. I was only analogizing to
12 the 11th Amendment cases that hold that the issue of whether
13 sovereign immunity is waived is a federal issue, not a state
14 issue. I didn't mean to suggest, as you appear to understand
15 here, that there is -- that there are 11th Amendment issues
16 in this case.

17 MS. PATEK: I'm not suggesting that you are, your
18 Honor, but I'm suggesting that -- and this sort of brings us
19 back to where Ms. Levine started out this morning with this
20 concept of -- this very basic concept, and one of the things
21 that makes this case so hard and one of the things that all
22 the commentators agree makes Chapter 9 so hard is this
23 tension. We have a federalist system. There are rules of
24 the road that were set up by the founders. We have a limited
25 system of federal government. All the other powers are

1 reserved to the states and the individuals. And there's no
2 question that wasn't done so that we could have big and
3 powerful states. That was done by the founders so that the
4 individuals close to the ground would have their rights
5 preserved, and I think within the structure of Chapter 9 and
6 within the limits of the Tenth Amendment, that the state
7 simply cannot use Chapter 9 to impair an express
8 constitutional promise. And I want to talk about that issue
9 for just one moment. This pensions clause is in a very
10 unusual place. Okay. This is -- I think it's fair to say --
11 you talk about there is a contracts clause in the state
12 Constitution just like there's a free speech clause and there
13 are a lot of things that mirror the Bill of Rights, but, as
14 Ms. Levine told us this morning, if somebody is violating my
15 free speech rights, I'm not in state Circuit Court. I'm
16 looking to the federal courts and the federal government to
17 protect those rights. If you're talking about fiscal
18 management, then that's a state issue, and in this case this
19 state and the people of this state chose to enshrine that
20 right to vested accrued -- this isn't all pension benefits,
21 this isn't future benefits, just what people have already
22 earned -- in its state Constitution and say those cannot be
23 impaired.

24 The Court asked the question about what if there's
25 not enough money, which sort of brings me back to the first

1 issue I was talking about. This Court has to rule on the
2 legal issue that's before it, and if there's not enough money
3 just like if you're in a Chapter 11 that you don't want to
4 see liquidation, that's a hard question that the creditors,
5 including the pensioners, including my clients, have to
6 answer along with the city and try to solve this problem
7 within the limits of Chapter 9 because if we don't solve the
8 problem, the only remedy is a dismissal.

9 THE COURT: Well, I guess even that answer troubles
10 me because if the Court holds here that there is this pension
11 right that cannot be impaired and because the governor didn't
12 condition this filing on the city recognizing that right in
13 the bankruptcy, what would happen upon dismissal? There'd be
14 this court holding that there's this unconditional absolute
15 right not to have pensions impaired. On behalf of your
16 retirees, you couldn't negotiate that, could you? How could
17 you?

18 MS. PATEK: I can't negotiate that upon my retirees,
19 but I suggest to the Court there is a solution to this
20 problem, and the solution is for the city to come back again
21 and to authorize -- have the state authorize the filing
22 within the confines of the Constitution, and we move forward
23 on that basis. I don't -- I understand that this has -- you
24 know, we talk about the elephant in the room, but the larger
25 part, the healthcare benefits, are not protected, and the

1 city has already said effective yesterday -- and these aren't
2 my clients, but -- we're done providing that. It's a
3 significant claim. I don't want to minimize that, but I
4 think it is something, given our constitutional structure,
5 that has to be dealt with in the confines of these
6 proceedings, and there are negotiations. There's a huge
7 consensual component to this, and that doesn't stop if the
8 Court rules the way that we've asked to rule.

9 I see my time is up. I just want to wrap up very
10 quickly, and I guess I would say we came into court on the
11 first day, and we supported the city, and we've supported the
12 city in many respects throughout this. We agree that there
13 should be the stay. There has been the breathing space. But
14 I think this is a hard, difficult question. As Ms. Levine
15 said, democracy is hard. This restructuring plan has to be
16 devised in accordance with applicable law, and the city on
17 the front end has to agree that it's going to -- it's going
18 to do so, and in the absence of that, I think they're not
19 eligible. Thank you, your Honor.

20 THE COURT: All right. Thanks to each of you.
21 We'll take our afternoon break now and reconvene at 3:20, a
22 half an hour from now, for the city's arguments.

23 THE CLERK: All rise. Court is in recess.

24 (Recess at 2:50 p.m., until 3:20 p.m.)

25 THE CLERK: Court is in session. Please be seated.

1 Recalling Case Number 13-53846, City of Detroit, Michigan.

2 THE COURT: And it looks like everyone is here.

3 MR. BENNETT: Good afternoon, your Honor.

4 THE COURT: Mr. Bennett, you may proceed.

5 MR. BENNETT: Good afternoon, your Honor. Bruce
6 Bennett of Jones Day on behalf of the city.

7 THE COURT: The only thing I would ask of you, sir,
8 is to leave enough time before our closing time today for me
9 to ask some questions of Mr. Todd. Doesn't need to be now.
10 It can be whenever it's convenient for all of you.

11 MR. BENNETT: Okay.

12 MR. TROY: Mr. Troy, your Honor.

13 THE COURT: Mr. Troy. I'm so sorry, sir. And so I
14 want to do that today because I'm not sure what his travel
15 plans are.

16 MR. BENNETT: Okay. Your Honor should feel free to
17 interrupt me if you think I'm getting too close to the end.
18 And I actually have one procedural question that I'd like to
19 get settled, too, which really has to do with whether you're
20 expecting or would benefit from oral argument at the
21 beginning of the next -- opening argument at the beginning of
22 the next phase because that's -- so I don't know if --

23 THE COURT: You mean tomorrow?

24 MR. BENNETT: No. On the evidentiary phase
25 beginning next week.

1 THE COURT: Oh, well not so much oral arguments as
2 opening statements.

3 MR. BENNETT: Opening statements is what I mean.

4 THE COURT: Yes.

5 MR. BENNETT: Okay. Great.

6 THE COURT: Yes. I think opening statements are
7 very important.

8 MR. BENNETT: Okay. I want to start with some
9 general comments, some of which are designed to respond to
10 things that came up this morning and some of which I think
11 just help, I think, set the stage for what at least the city
12 believes is happening in this Chapter 9 case. And I want to
13 start by saying that the purpose of the Chapter 9 case is to
14 adjust the city's debts, and that means all of their debts,
15 obligations evidenced by bonds, obligations under other
16 contracts, obligations to provide healthcare, and pension
17 obligations. And so that there isn't any confusion, there's
18 been a lot of reference to statements that were made. I
19 think the statement most cited and the one that I think is --
20 it's the same as all the other ones that have been made -- is
21 that there must be -- the statement was there must be
22 significant cuts in accrued vested benefits. It's been cited
23 often, and it's true.

24 I want to make a couple of clarifications. I don't
25 think anyone for the city ever said we were going to

1 eliminate pensions. This has been about the underfunding
2 amounts. It is the underfunding amounts that are problems.
3 I think your Honor understands that, but I think it's
4 important to remind everybody else that we've never said that
5 the objective is to eliminate pensions. The objective is to
6 address the underfunding situation.

7 Now, why did we make that statement? The
8 statement --

9 THE COURT: Well, let me just put it right to you.
10 Is it your intent to propose a plan to reduce pensioners'
11 monthly checks?

12 MR. BENNETT: To be very technical about it, what we
13 have -- what we have -- what we have noted is that it is
14 impossible for the city to fill the underfunding gap in the
15 existing pension trusts, and we have also said that likely
16 requires changing the amounts of pension benefits. Now --

17 THE COURT: By "changing," you mean reducing?

18 MR. BENNETT: Reducing. Now, I do want to -- I'm
19 going to skip a couple points and then come back.
20 Notwithstanding the fact that the Chapter 11 case has been
21 filed, it remains the city's hope that these adjustments will
22 be achieved on a consensual basis pursuant to agreements
23 reached with the holders of the obligations. That is still
24 the objective. And, of course, we are participating in
25 mediation that's intended to facilitate that goal, and,

1 frankly, we'll meet with anyone anyplace anytime to try to
2 achieve that goal. And we're going to discuss at certain
3 points certain statements that have been made by others in
4 this case about this problem which may suggest that those
5 discussions are going to be particularly difficult, but I
6 want there to be absolutely no confusion about where the
7 city -- where the city stands on this.

8 And by the way, the filing doesn't say how
9 ultimately this case is going to end, whether it's going
10 to -- whether we're going to have a consensual plan, whether
11 we're going to have a nonconsensual plan, whether it'll be
12 partly a consensual plan or partly a nonconsensual plan. And
13 although the city did make a proposal that certainly
14 contemplated cuts to the underfunding obligation and
15 ultimately to benefits that absolutely is a part of the June
16 14th proposal, it was a proposal in an out-of-court
17 negotiation, and I want to submit -- and we're going to come
18 back to this point later -- it can't possibly be
19 impermissible to ask to reduce benefits, particularly when
20 you can demonstrate a need to do so. And so far, frankly,
21 that's what the city did pre-petition, and so far that's what
22 the city has done post-petition. We haven't filed a plan
23 yet. It will come soon. And there has not been a request
24 for cramdown, so -- and I think as we get into other parts of
25 the argument -- the fact that we don't quite know what's

1 coming later may have some bearing on some of the legal
2 points that your Honor has talked about and that others have
3 talked about earlier today.

4 THE COURT: Is it the city's position that the State
5 of Michigan does not have the obligation under the Michigan
6 Constitution to guarantee the city's underfunding?

7 MR. BENNETT: I don't know if the city has a
8 position. I will tell you that I have read all of the
9 materials probably more than anyone else in the city's team,
10 and I don't think the state has an obligation to guarantee
11 the pension obligations of a municipality. I think actually
12 when you look at the --

13 THE COURT: Isn't it in the city's best interest to
14 say that -- or to assert that the state does have that
15 obligation?

16 MR. BENNETT: I don't know whether it is or is not
17 in the city's best interest to even take a position on that
18 point, and that's why I said I don't think the city has a
19 position on that point, but I have done a lot of the work,
20 and I think I've made up my own mind as to what I think is
21 there. I do think it's in the city's position that if we
22 could get money from the state, we would want it, and it
23 would be a great thing, and I'm reasonably certain that that
24 sentiment has been expressed on more than one occasion.

25 THE COURT: Well, is there any reasonable prospect

1 that the state will comply with that request in the absence
2 of a legal obligation -- a determined legal obligation?

3 MR. BENNETT: I don't know the answer to that
4 question. Thus far the state has been of the view that the
5 city has to reorganize based upon its own financial
6 resources.

7 Okay. The next point I wanted to touch on is the
8 fact that there are a large array of state and federal
9 statutes that say in all kinds of different ways that the
10 city is obligated to pay its debts. In fact, they say that
11 the city is obligated to pay its debts in all kinds of
12 different ways. And the city itself and the state has no --
13 and we'll get into this in much more detail -- no ability in
14 order to overcome those laws or very, very, very limited
15 ability to overcome those laws. One important point about
16 them that didn't --

17 THE COURT: You mean comply with those laws?

18 MR. BENNETT: No. To overcome them to get past them
19 if they can't pay all of their obligations. And, again, it's
20 a situation that the city is going to prove it's in, but
21 that's for another hearing. The point I wanted to make here
22 that I don't think was made earlier today was that a lot of
23 these priorities collide with each other in all kinds of
24 different ways. We heard, by the way, about the all assets
25 at their disposal comment that was, I guess, from the

1 constitutional convention. Assuming for a second that that
2 is what was intended, the problem is is that the legislature
3 has also passed a law that describes certain debts -- the
4 obligation to pay certain debts as a, quote, "first budget
5 item," close quote. I don't remember the rest of the
6 sentence, but those words are there. There's also other
7 state statutes that don't actually grant a lien but that say
8 proceeds of certain things must be used in certain orders to
9 pay. And when you sit down and try to figure out in any
10 environment where you don't have enough, how do you fit all
11 these different things together, you run into a problem very,
12 very, very quickly. And these are the provisions, by the
13 way, that are protected by the federal contracts clause and
14 also by the Michigan contracts clause because many of these
15 provisions are in ordinances or resolutions that form part of
16 bond contracts, and others are in ordinances and resolutions
17 that form part of employment contracts. So you wind up -- if
18 you look at the world before you even start talking about
19 bankruptcy, you don't just have coherent commands, this is
20 how you pay and this is how you go about doing it and
21 everything works, you have a whole bunch of priorities that
22 actually don't work, and this, frankly, is --

23 THE COURT: Well, but the objecting parties say all
24 of those contract obligations that have protection merely
25 under the contracts clause, federal or state, can be adjusted

1 consistent with state and federal law, but the pension
2 obligation under the state Constitution is inviolate.

3 MR. BENNETT: And we'll get to that if you'll give
4 me a chance. I will explain why --

5 THE COURT: Okay.

6 MR. BENNETT: -- they are, in fact, no different,
7 but I guess my point here is that outside of bankruptcy, you
8 have a -- you don't have coherence, and this is really to the
9 whole point of does it really make any sense to have a rule
10 that says if the state conditions its filing a proceeding
11 based upon complying with its priorities, what do you even
12 have. And in many circumstances, you have something that is
13 just not meaningful in the context of where there's not
14 enough to go around. I think that's the narrow point for the
15 time being. We will generalize when we get to the whole
16 issue of how the --

17 THE COURT: Okay.

18 MR. BENNETT: -- different clauses work. I also
19 want to say that contrary to the papers that were filed --
20 and I'm now referring to the UAW's papers -- the June 14th
21 proposal didn't take broad aim at the city's workers and
22 retirees. It was very, very carefully drafted to try to
23 treat as many classes of creditors the same as we possibly
24 could denying preferences to any except in cases where we
25 were legally compelled to provide them. We thought and the

1 emergency manager thought that that was the best way to go
2 about the problem that confronted us, and, of course, we're
3 not under any illusion that that's going to be the last word
4 on this question. There will be negotiations. There will be
5 a plan filed, which I'm certain will differ from the proposal
6 that was issued on June 14th in part to respond to creditor
7 input, and it will be subjected to enormous and exacting
8 procedures by this Court before it is ever confirmed.

9 I also want to spend just a second about the point
10 that was made using some of the letters, the letters that
11 were exchanged between the emergency manager and the
12 governor. If your Honor hasn't already, I commend you to
13 read all of them, not just the parts that were quoted. I
14 think it's -- I think to fairly summarize the points made in
15 both letters, the city has been -- the city services, city
16 residents, the ability of the City of Detroit to be a city
17 that provides adequate services to its residents has
18 gradually been lost as a result of the constant and
19 consistent diversion of current tax revenue paid by current
20 tax revenue to legacy liabilities, including but not limited
21 to pension claims. That is the problem. It is not as if
22 everything is fine, let's take some money from pensioners and
23 put it to the benefit of residents to make things better.
24 The diversion already occurred. State law has been followed.
25 Pensions have not been impaired or diminished. A consequence

1 has been that the resources available for services, that the
2 resources available for investment have, in fact, been
3 significantly impaired and significantly diminished to the
4 point that lots of the city's infrastructure is no longer
5 serviceable, thus the reference to need for investment. It's
6 not for the new and wonderful. It's to put back things that
7 really need to be updated and, in fact, replaced because
8 they're worn out, and it's to restore budgetary items,
9 budgets that have, in fact, been cut too great. And I think
10 that sense -- if you read the entire document, you will see
11 that that is the historical view of the current situation.
12 Again, it will be proved next week. And the solution is in
13 part a reinvestment program. Again, just to be technically
14 correct, it's 1.25 billion over ten years, not over five
15 years. Five years would be better. I don't think anyone
16 thinks we can afford it.

17 I think the next point and the last point I'm going
18 to make by way of introduction is really to address one of
19 your Honor's questions, which is what happens if the city
20 can't adjust its debts. I think we have to start with the
21 following. Most business owners and residents are smart
22 enough and sophisticated enough to figure out that it's a
23 problem to be the highest -- residents of the highest taxed
24 jurisdiction in the State of Michigan where somewhere between
25 42 and 65 cents of every dollar is spent on something other

1 than services to current residents. That is not a stable
2 situation. That is just not going to work out well. The
3 consequence will be continuing declines in revenue. It may
4 be that debts of all kinds would be paid for awhile, but
5 ultimately debts of all kinds will not be paid, and no
6 provision of any Constitution will change this. Thus, the
7 stakes are very high not just for the city but also for its
8 residents and its creditors, and I think that puts a very
9 sharp point on your Honor's question about what is a
10 constitutional provision worth when you're confronting an
11 economic crisis such as this.

12 Unless your Honor wants to hear much about it, I was
13 next going to talk about your jurisdiction to decide the
14 eligibility question, but no one else raised it on oral
15 argument, and since it wasn't raised on oral argument, I'll
16 leave it to the papers unless your Honor has any particular
17 questions with respect to that point.

18 THE COURT: No.

19 MR. BENNETT: And I'd like to take the same
20 prerogative that if I intentionally pass over a topic because
21 it wasn't covered today, if it's in our papers, we still care
22 about it.

23 THE COURT: Of course.

24 MR. BENNETT: I'm just going to try to use time
25 wisely. So the first place I'm going to spend some time is

1 on the constitutionality of Chapter 9, and I'm going to do it
2 a little bit differently because I think, frankly, if we do a
3 really careful look at Bekins -- and I'm going to call it
4 Bekins because it's a really big company in California that
5 has -- the name is spelled B-e-k-i-n-s, and everybody calls
6 it Bekins, but I don't know what the correct pronunciation in
7 this particular case is concerned. A very careful analysis
8 of Bekins -- and believe it or not, the Cardozo dissent in
9 Ashton is going to provide us with the guidepost to answer a
10 lot of the questions that may not be constitutional questions
11 but that ultimately are resolved by those cases. First, I
12 have to say because it's important that it isn't this Court's
13 place to overrule Bekins. Bekins has been the law for lots
14 of years. And as the U.S. Attorney pointed out, it's not
15 only that Bekins hasn't been overruled, it's actually never
16 been challenged or questioned or otherwise suggested to be
17 worthy of reconsideration by anything that the Supreme Court
18 has done. And, moreover, in all of the discussion that your
19 Honor heard about why Bekins should not be regarded as good
20 law anymore, no one actually said that the -- that Chapter 9
21 has been changed in any material way from the law that was
22 before the Court in Bekins, and that's because in all the
23 ways that mattered it really hasn't changed, not just -- not
24 by a little but really not at all. However, we don't want
25 the Court to write an opinion that says, well, you feel

1 constrained not to overrule Bekins. You think it should be
2 overruled. So I'm going to spend some time talking about why
3 Bekins is absolutely right and why Asbury Park and anything
4 else didn't change anything.

5 Let me start with just a quick word on Asbury Park.
6 Even to the Supreme Court, if you read their own words,
7 Asbury Park is kind of considered an outlier. It has -- the
8 Supreme Court has never since approved a municipality's
9 modification of its own contract on the basis of emergency or
10 anything else. Every time it's been asked to, it's basically
11 talked about Asbury as being, number one, confined to its
12 facts and extraordinary situation and not reflective of a
13 broad doctrine. This same argument was made to Judge Bennett
14 in the Jefferson County case, and he commented on it. I
15 think we've cited to that case in our papers. He does an
16 even better job than I just did of explaining why Asbury is
17 an outlier. It doesn't provide much comfort to any
18 municipality thinking it's going to modify its debts without
19 the help of the Bankruptcy Code and is no good reason to
20 reconsider Bekins.

21 Now, the next thing I want to talk about is what
22 Bekins really does, and the -- a reality that you can find in
23 Bekins if you're looking really hard, but unfortunately you
24 have to look really hard, is that there were two
25 constitutional provisions at stake when the Chapter 9's

1 predecessor was subject to Supreme Court review. One was the
2 Tenth Amendment, and some people have talked about that. And
3 the second part was the contracts clause. And when you read
4 Bekins, the Court kind of touches on all the different
5 features that matter but isn't particularly careful about
6 matching up which features were needed to overcome which
7 constitutional problem. And, frankly, in there we're going
8 to find the answers to a lot of the -- a lot of the other
9 questions that come up in this case.

10 So let's start with the Tenth Amendment. Of course,
11 the Tenth Amendment, if you quote the whole thing -- and when
12 your Honor confronted earlier, I'm not sure the first six or
13 so words were quoted, "powers not delegated to the United
14 States by the Constitution, nor prohibited by it to the
15 states are reserved to the states respectively, or to the
16 people." For starting purposes, "powers not delegated to the
17 United States" are important words, and one of the things
18 Bekins very clearly says is uniform laws on the subject of
19 bankruptcies are delegated to the United States and that laws
20 on the subject of bankruptcies include municipal debt, and I
21 think they used "composition" as opposed to "adjustment," but
22 composition statutes. So it's actually not a close call that
23 the -- at least as far as the Supreme Court is concerned --
24 and I think that's all that matters for this purpose is that
25 we're going to have a municipal Bankruptcy Code that at least

1 covers subjects of bankruptcy and that those are clearly
2 federal functions. Where a Bankruptcy Code applicable to
3 municipalities --

4 THE COURT: Well, but we know from several Supreme
5 Court cases that the mere fact that Congress legislates
6 within its authority does not necessarily by itself mean that
7 it's consistent with the Tenth Amendment.

8 MR. BENNETT: Well, actually I think --

9 THE COURT: Right? You've got Printz --

10 MR. BENNETT: Well --

11 THE COURT: -- in New York at a minimum that hold
12 that.

13 MR. BENNETT: Well, that was the commandeering
14 point. We'll get to commandeering. There's no commandeering
15 in the Bankruptcy Code.

16 THE COURT: Well, I don't mean to suggest that there
17 is, but in the laws that Congress passed that the Supreme
18 Court held unconstitutional there, they were legislating
19 within their commerce clause or other enumerated power.

20 MR. BENNETT: Okay. In the radioactive waste case,
21 the New York case, it was because they used means that were
22 inappropriate that offended the solvency -- excuse me --
23 offended the sovereignty of the states. In the Bankruptcy
24 Code -- in the context of the Bekins case, I think when you
25 read the case, they were worried about something different.

1 They were worried about the -- in Ashton the majority was
2 clearly worried about the bankruptcy parts going too far and
3 intruding on insolvent -- on sovereignty issues that weren't
4 actually close enough to the core bankruptcy problem. That's
5 where we got the governmental and political powers type
6 exception that we have today, and so -- but I don't think
7 there is -- your Honor is correct. If the way that the --
8 that Congress chose to legislate on the subject of
9 bankruptcies affecting municipalities was to tell state
10 courts what state courts had to do, then you would
11 conceivably have a problem, but there's nothing about the
12 Bankruptcy Court that tells -- state any things what states
13 have to do. What the Bankruptcy Code tells courts, what it
14 tells federal courts what they should do when confronted with
15 a municipality that petitions for relief and petitions for
16 relief with proper authorization. And so I don't think that
17 is -- that doesn't implicate the second half of the Tenth
18 Amendment. It only implicates the first half of the Tenth
19 Amendment, and, quite frankly, it's protected by it.

20 And this is going to come up with something later.
21 When we think about the issue of priorities -- and that's a
22 word that encompasses lots of different things, and we can
23 break it down further if we need to -- priorities are at the
24 core of the subject of bankruptcy, absolutely solidly in the
25 core, so a point I want to make and we'll come back to is

1 that we're not really dealing with the part of the Bankruptcy
2 Code that gets closest to offending sovereignty. We are
3 really dealing with -- when we talk about where pension
4 claims stand in the world and where they can be impaired, we
5 are dealing something that is core to the subject of
6 bankruptcies. It's not at the edge of the things that made
7 the difference between the constitutionality and
8 nonconstitutionality of the Bankruptcy Code under the Tenth
9 Amendment.

10 THE COURT: Well, I think possibly your colleagues
11 on the other side might take issue with that because they
12 analogize the pension right to a property right, which is a
13 matter of state law, at least under our present Bankruptcy
14 Code. It probably doesn't need to be, as a matter of
15 constitutional law, but it is.

16 MR. BENNETT: We will come later, and believe it or
17 not, it's going to be implicated in other aspects of the
18 Chapter 9 case not having anything to do with pensions to
19 where the line is between a priority and a property right.
20 When we talk later -- I'll get to it later. I have a whole
21 section on why in this instance a pension is an unsecured
22 claim and not a property right.

23 THE COURT: Okay.

24 MR. BENNETT: If we -- just to take a short part
25 about it now, as I read the cases, there are some cases that

1 talk about an entitlement to money being a property right,
2 but in every single one of those cases the money was there,
3 so, for example, it was in a bank account and the balance was
4 there. In another circumstance, you were dealing with a --
5 an entity was reducing the amount of money that was supposed
6 to be paid to an employee, but there was a hundred cent
7 dollars there, and the three percent that was going to be
8 carved out was going someplace else. There is no
9 constitutional case that deals with a promise that there -- a
10 promise that might or might not be satisfied because there's
11 not enough money and say that kind of a promise is a property
12 right. So I think that if you -- if we apply carefully the
13 Supreme Court cases -- and when I get to them, I'll remember
14 the citations -- we are going to find that an unsecured
15 promise where the actual sum of money can't be pointed to
16 because it's not there yet, that's not a property right and
17 never has been, and so the Fifth Amendment is not implicated
18 here. This is absolutely a contracts clause case, and we'll
19 get to the contracts clause -- clauses in a second.

20 Okay. So I want to -- last point with respect to
21 the Tenth Amendment, of course, Bekins says it's
22 constitutional under the Tenth Amendment. The Bankruptcy
23 Code, in particular, its part relating to municipalities,
24 it's constitutional under the Tenth Amendment. It finds that
25 the combination -- that apart from the fact that it's subject

1 to bankruptcies, it finds that the fact that the Code, then
2 the Act, had carefully carved out governmental and political
3 powers, kind of the -- that is, the relationship between a
4 municipality and its subjects -- it's carved that out. It
5 says that is an appropriate safeguard to states retaining
6 sovereignty, and they say, "And, oh, by the way, there's a
7 consent requirement." So those two things, the consent
8 requirement, the -- what I'll call the 903-904 carveout, and
9 the fact that the uniform laws on the subject of bankruptcies
10 are fair game for the federal government, those three things
11 are the three points that the Bekins court says it's okay for
12 Tenth Amendment purposes.

13 Now, it's time to work about -- talk about the
14 contracts clause problem. Your Honor is clearly familiar
15 with what the contracts clause problem is. You have a
16 contracts clause -- and I have a cheat sheet for everyone.
17 I've provided my colleagues on my left with a copy during the
18 break. If your Honor --

19 THE COURT: Sure.

20 MR. BENNETT: -- will, I'd like to pass up --

21 THE COURT: If you'd like me to look at it, sure.

22 MR. BENNETT: -- copies. And here we have the three
23 clauses that we need to talk about, the federal contracts
24 clause, the state contracts clause, and the pensions clause.
25 As far as the Bekins court is concerned, it's talking only

1 about the federal contracts clause, and where I'm going is
2 it's not going to make any difference. And what the
3 Bekins -- the Bekins court doesn't think that consent of the
4 state has anything to do with getting beyond this clause
5 probably because it knows that there's no consent out to the
6 contracts clause. Instead, it finds that the reason why that
7 the municipal bankruptcy act is constitutional is because the
8 entity that is actually impairing or changing contracts is
9 not the state. It's not the municipality acting by the
10 state. It is the court itself. And the key quote is the
11 state invites the intervention of the federal, my word,
12 bankruptcy power to save its agency -- that's really a
13 synonym for municipality -- which the state itself is
14 powerless to rescue. And the reason the state is powerless
15 to rescue it is because of the contracts clause. Through its
16 cooperation with the national government, the needed relief
17 is given. So under -- so as far as Bekins is concerned,
18 under Chapter 9 the federal government, through its courts,
19 is the pertinent actor.

20 Now, you could write this more elegantly, and it
21 wasn't in our briefs because I actually didn't find it until
22 last night, and that is Ashton. You know, I have to
23 confess --

24 THE COURT: That is what, sir?

25 MR. BENNETT: Pardon?

1 THE COURT: What did you say it was?

2 MR. BENNETT: Ashton. Until yesterday I'd never
3 read Ashton. After all, everybody knew it had been overruled
4 by Bekins. But I read it last night, and I got to the end,
5 and I realized there was a dissent by Cardozo. And I read it
6 because it was by Cardozo because he writes really well. And
7 he took this particular issue head on, and so I'm going to
8 read a lot of sentences from it. It's on page 142. And
9 here's what he says. He, of course, is dissenting, so he's
10 finding the last version constitutional, and he gets to the
11 contract clause problem. And by the way, one of the things
12 about Cardozo's dissent is that he's also much better about
13 dividing the Tenth Amendment analysis from the contracts
14 clause analysis. He kind of does it explicitly separately.
15 And he says this. This is about the contracts clause. "The
16 act does not authorize the states to impair through their own
17 laws the obligation of existing contracts. Any interference
18 by the states is remote and indirect." I'm going to skip
19 some things, some citations and some things that aren't that
20 important, and get to something that's more important. "If
21 contracts are impaired, the tie is cut or loosened through
22 the action of the court of bankruptcy approving a plan of
23 composition under the authority of federal law. There, and
24 not beyond in an ascending train of antecedents" -- it's an
25 amazing sentence -- "is the cause of the impairment to which

1 the law will have regard," skipping some citations.
2 "Impairment by the central government through laws concerning
3 bankruptcies is not forbidden by the Constitution.
4 Impairment is not forbidden unless effected by the states
5 themselves. No change in obligation results from the filing
6 of a petition by one seeking a discharge, whether a public or
7 a private corporation invokes the jurisdiction." We're going
8 to use that sentence again when we talk about whether -- how
9 much we have to decide today. "The court, not the
10 petitioner, is the efficient cause of the release."

11 For some reason Cardozo didn't participate in
12 Bekins. The Bekins court, I think, said the same thing. I
13 just think they said it a lot less clearly and a lot less
14 elegantly.

15 So I think this is very informative about the right
16 way to think about who is doing what and will become
17 important when we get to the authorization problem, which
18 we're going to be at very soon, but I want to --

19 THE COURT: Where do you think in Bekins the
20 majority of the court or the court itself said the same
21 thing?

22 MR. BENNETT: The words I read at the -- I'm sorry.
23 I got to find the back pages. The words I started with,
24 the -- it's at page 54. The state invites the intervention
25 of the federal bankruptcy power to save its agency -- means

1 municipality -- which the state itself is powerless to
2 rescue -- that's the reference to the contracts clause.
3 Through its cooperation with the national government, the
4 needed relief is given. I think the -- I think they're doing
5 exactly the same thing and just managed to do it in a lot
6 fewer words but with -- losing a teeny bit of precision in
7 the process, but it is the same thing. They are basically
8 adopting the Cardozo view of why the bankruptcy law is
9 constitutional under the contracts clause, the federal
10 contracts clause.

11 And, you know, I quoted these words, but there are
12 words before it and words after it that basically zeroes in
13 on that they're dealing with this particular issue at this
14 particular point in time. This is just as much as they say.

15 The Bekins court, of course, there's no dissenting
16 opinions. There's two judges that say they dissent for the
17 reasons expressed by the majority in Ashton. That's all they
18 do. And so that may well be one of the reasons why the court
19 was a little bit less careful. Of course, what Cardozo said
20 isn't precedent. It's just very, very clear thinking,
21 elegantly written about exactly the problem we have in this
22 courtroom today, and I think it's awfully persuasive, and I
23 think it is reflective, although certainly done better, than
24 the work that was done by the Bekins court.

25 A couple of other constitutional issues before we

1 move on to the authority points and the different contracts
2 clauses. AFSCME does take the position in their papers that
3 the contracts clause continues to constrain all municipal
4 bankruptcies. Of course, the federal contracts clause we
5 know from the Supreme Court does not. We'll talk about
6 whether there's any difference in the state courts soon. But
7 why AFSCME takes that position is they know full well that if
8 the contracts clause is easily bypassed by a municipal
9 bankruptcy case -- and we think that it is for precisely the
10 reasoning of Judge -- Justice Cardozo -- then this is over
11 because the contracts clauses, as we're about to get to, are
12 very, very similar. They're almost identical to each other,
13 and they're identical in all the ways that matter. We will
14 go through it very carefully.

15 There was next the point that was made about
16 accountability. I don't think there's any confusion about
17 accountability. I think, again, I appeal to Cardozo's
18 language but also to Bekins on this point. If you don't like
19 the powers that a court has in Chapter 9, write your
20 Congressman. If you don't like the way Detroit was managed
21 so that it wound up in Chapter 9, don't let the people who
22 used to be in office be in office again in Detroit. If you
23 don't like the emergency manager and don't think he was
24 qualified and don't like what he was doing, write the
25 governor or your state legislator. There is no

1 accountability question if you break it down in the way that
2 Cardozo broke it down. And by the way, the other thing
3 Cardozo says and I think also Bekins says, there's nothing
4 wrong with asking. You have to ask if you're going to do
5 this consensually. The emergency manager on behalf of the
6 city had to ask the retirement funds directly, retirees more
7 indirectly, to reduce or change benefits in order to
8 accommodate the needs of current city residents and the
9 ability of the city to survive. They could also ask the
10 Court to exercise its authority to help, too. That doesn't
11 mean they are the one loosening the knot or cutting the knot.

12 We talked about Asbury Park. Anti-commandeering
13 cases. Again, I think -- well, the federal government's
14 brief does a much nicer job on this than I ever could in
15 pointing out that the essence of the commandeering cases are
16 the federal direction to state actors -- in this case, maybe
17 it would be state judges or the emergency manager or the
18 governor -- to do something in a particular way. And, in
19 fact, the -- that's not what happens. That is not the
20 structure of Chapter 9 at all. The structure of Chapter 9 is
21 that there is certain power that is vested in this Court, and
22 that power can be used in certain ways. Frankly, your Honor
23 can't tell the city what kind of plan to file, but your Honor
24 can say whether or not you will approve a plan that is filed,
25 so the request has to be made by the city, and the power has

1 to be exercised by your Honor. Again, the city itself is
2 powerless to escape the contracts clause, but it does not --
3 at no point does the federal government say I have a policy
4 that I am going to ask the states or demands that the states
5 implement for me. That doesn't happen anywhere in Chapter 9,
6 and, frankly --

7 THE COURT: Well, but Ms. Ceccotti doesn't agree
8 with that. What she says is Congress says if you want to
9 adjust your debts, we prescribe the priority scheme to the
10 exclusion of the state. The state can't come in with its own
11 notion of what the priorities should be so that the division
12 of sovereignty that results violates the Tenth Amendment.

13 MR. BENNETT: Well, first, there's a logical failure
14 there, and it has to do with Asbury Park. The UAW starts
15 with the proposition that there is some kind of viable state
16 restructuring process that can actually work and that the
17 federal government took it away from them and made the
18 bankruptcy -- the Chapter 9 exclusive. That isn't reality.
19 Asbury Park, as we've seen, first of all, is an unbelievably
20 exceptional case, which, by the way, the end holding is that
21 that restructuring was done for bonds and made bonds better.
22 That is the holding at the end of the day or the key facts at
23 the end of the day in Asbury Park. Asbury Park is not and
24 never has been construed to be -- and no one cited any case
25 to your Honor showing that in the period of time before

1 Congress claimed the field for itself that there was any
2 viable municipal debt adjustment opportunity created by what
3 we have to call the Asbury Park exception to the contracts
4 clause. And if you believe everything in the UAW's belief --
5 brief and believe their interpretation of the pensions
6 clause, it gets even worse, that even if there were -- was
7 Asbury Park wiggle room and then in the absence of the
8 Bankruptcy Code the pensions clause is absolute, you have
9 worse than nothing. You have worse than the almost
10 meaningless Asbury Park exception. So I don't think it's
11 coercion for the -- for Congress to say you can't do
12 something that you can't do. And I think the prohibition on
13 competing state municipal schemes is, frankly, recognition
14 that they're not possible or workable, and, again, no one has
15 been able to show you either before or after that provision
16 of the Bankruptcy Code what this wonderful municipal scheme
17 is out there that would have been a choice. Cardozo doesn't
18 think there's any choice. Bekins doesn't think there's any
19 choice. And that's the same court that decided Ashton, so
20 I -- about the same time actually or Blaisdell was about the
21 same time. Ashton may have been later. This is a -- I
22 think -- I don't think Congress coerced anybody. I don't
23 think that's possible on the facts.

24 Okay. So to summarize, we've shown that Chapter 9
25 is constitutional and that, in particular, it does not offend

1 the contracts clause in the United States Constitution. I
2 think along the way we've demonstrated that the state's
3 authorization of a municipality's resort to Chapter 9 for
4 relief from contracts generally does not constitute a state
5 impairment of contract because otherwise no -- not a single
6 Chapter 9 would work. We have also along the way noted that
7 the filing of a petition itself doesn't constitute impairment
8 of anything in any event and that if there is an impairment,
9 it's by the federal Bankruptcy Court, so now let's look at
10 our contracts clause cheat sheet and try to find out whether
11 there's any difference because of the fact that there's a
12 state contracts clause or because there's a pensions clause.

13 First, with respect to the state contracts clause, I
14 don't think anyone has suggested to the Court that this is
15 any different than the federal contracts clause, and, in
16 fact, there isn't. There's no difference, and no one
17 suggested it, so -- but, by the way, Justice Cardozo, again,
18 as -- more elegantly and more precisely but -- and the Bekins
19 court both would believe that the state contracts clause --
20 okay -- is also focused on the state. It doesn't bind the
21 federal government. And since the federal government is the
22 relevant actor, the state contracts clause does not impose
23 any obstacle at all to a municipality invoking Chapter 9
24 relief.

25 The only thing I want to pause to say is it couldn't

1 be otherwise because if it were otherwise -- I skipped a
2 step. Every state -- at least every state I looked at, so
3 there may be an exception, but every state has a state
4 contracts clause. It's not surprising. Copied it from the
5 federal Constitution. So if it were the case that the
6 state's contracts clause was different than the federal
7 contracts clause and that it was a barrier to invoking
8 Chapter 9 relief, then every single bondholder in every
9 single -- I should say every single lawyer for every single
10 bondholder in every prior Chapter 9 case has probably been
11 guilty of malpractice because they might have been able to
12 escape their prior Chapter 9 cases -- and there are now
13 hundreds on the books -- on this basis alone. But, again,
14 for the reasons expressed in Bekins and more elegantly by
15 Judge -- Justice Cardozo, they can't.

16 So now we finally get -- we reach the pensions
17 clause also quoted in front of you, and we say, okay, is this
18 pensions clause any different than --

19 THE COURT: But hang on. Isn't there a difference
20 between reconciling the bankruptcy clause with the federal
21 contracts clause on the one hand and trying to reconcile how
22 a state that prohibits itself from impairing contracts with
23 taking advantage of the bankruptcy power that the federal
24 court has enabled -- or that the federal Congress has enabled
25 because of the sovereignty of the state?

1 MR. BENNETT: No difference. Why? Let's remember.
2 The reason why I spent so much time talking about why was the
3 Debt Adjustment Act under the Bankruptcy Act constitutional
4 as far as the federal contracts clause was concerned -- it
5 wasn't about the language of the federal contracts clause.
6 It was because the state isn't an actor. The federal
7 contracts clause acts only on states. The relevant actor is
8 the federal government. It's the Bankruptcy Court. That was
9 the reason why there was no federal contracts clause problem
10 with the Bankruptcy Act in Bekins, and it was the only
11 reason -- the only part of the opinion that had to do with
12 the federal contracts clause part of the problem. The state
13 contracts clause acts again only on the state, not on the
14 federal government. Accordingly, if you believe -- and the
15 Supreme Court has held that the relevant actor for purposes
16 of untying or cutting the knot is the federal Bankruptcy
17 Court and not the state, then the state contracts clause
18 forms no additional barrier to the use of the Bankruptcy Code
19 than the federal contracts clause did. They are the same,
20 and they are both not relevant for the same reason.

21 THE COURT: And your position is that it's a matter
22 of federal law that the pertinent actor is the federal court,
23 not the state entity that's in bankruptcy?

24 MR. BENNETT: The Supreme Court told us along the
25 way to approving the Bankruptcy Act the first -- for

1 municipalities the first time that it's --

2 THE COURT: So even if the state law were to say
3 it's the city that's the pertinent actor, that's not relevant
4 because it's a federal law question.

5 MR. BENNETT: Correct. So for purposes of federal
6 law, the Supreme Court has told us it's the federal
7 Bankruptcy Court that is the relevant actor.

8 So now we get to the pensions clause, and we've got
9 to find that there's a difference. And I think I want to
10 start here. This is going to be somewhat repetitive of the
11 brief. There's nothing in the pensions clause that says
12 anything like, quote, "and the state shall not authorize any
13 municipality to commence a bankruptcy case that would allow a
14 federal court to impair or diminish pension claims." It just
15 doesn't say that. And, of course, it is words like that that
16 the objectors are saying have to be imported into the
17 pensions clause.

18 It's hard, I think, because at the end of the day,
19 apart from the fact that the pensions clause is, quote, "more
20 specific," and it's, of course, more specific because they
21 were looking at pensions because the law in Michigan at the
22 time they were looking at the pensions clause was that
23 pensions weren't a contract. That's the only reason it's
24 more specific. It wasn't because -- there's no other
25 evidence for why it was more specific. The only

1 difference -- the only words that are different are the
2 words, quote, "be diminished." Excuse me. Quote,
3 "diminished or." That's the only difference. "Impaired" is
4 used in all of them. "Prohibition of impairment" is used in
5 all of them. All of them are absolute about prohibitions of
6 impairment.

7 And I'm going to take this in two steps. First of
8 all, the objectors say --

9 THE COURT: Well, but hang on. There's the next
10 sentence, which you didn't include on here, the next sentence
11 of the pension clause.

12 MR. BENNETT: Okay. The funding sentence?

13 THE COURT: Yes.

14 MR. BENNETT: Okay. Well, frankly, that's not
15 focusing on today, and it sounds like it's a --

16 THE COURT: Well, but the objectors argue that this
17 additional consideration that the Michigan Constitution gave
18 to pensions which it didn't give to contracts elevates it,
19 makes it, if not absolute, more absolute than contracts.

20 MR. BENNETT: Well, let's talk about -- I
21 specifically wanted to talk about that because --

22 THE COURT: Okay.

23 MR. BENNETT: -- first of all, why is it -- we
24 should ask ourselves question number one. Why is it that the
25 federal contracts clause and the state contracts clause

1 became less than absolutely binding? It wasn't because of
2 the inadequacies of the language. It was -- in fact, what
3 the courts have done is they put the word "substantial" in
4 front of the word "contract," so an insubstantial impairment
5 doesn't count, and a substantial impairment has some extra
6 hurdles that you have to go over before you can make it. So,
7 frankly, if what they were trying to do was to tighten the
8 pensions clause and make it more distinctive -- and if they
9 went to the books because, of course, all of the cases, you
10 know, Worthen versus Thomas, Home Building & Loan Association
11 versus Blaisdell, these are like cases from the mid-'30s, so
12 they were all on the books in 1961 through 1963, so they knew
13 that, and they knew that the problem was the incorporation of
14 the substantialness concept. So if they were really after
15 solving that problem, why didn't they just put the words
16 right before "impairment" "substantial or insubstantial
17 impairment"? And they could have tightened it up in the way
18 that it had been loosened. They could have prohibited
19 substantial and insubstantial impairments. That would have
20 dealt with -- if they were trying to say we're opting the
21 pensions out of the judge-made doctrines and exceptions that
22 have burdened the federal contracts clause and the state
23 contracts clause, that's how they might do it.

24 Now, by the way, it would be irrelevant to this
25 argument because remember the pensions clause, just like the

1 state contracts clause, just like the federal contracts
2 clause, acts on states and municipalities. It doesn't act on
3 the Bankruptcy Court. It doesn't act on the federal
4 government. And once again, if the right actor -- if the
5 actor that unties the knot or cuts the knot is the federal
6 Bankruptcy Court and the federal government and not the state
7 and not the municipalities, as the Supreme Court says, then
8 the pensions clause, even with the words "substantial or
9 insubstantial" in front of it, doesn't get you all the way
10 home. What they next needed to do in the pensions clause is
11 to say by enacting the pensions clause and giving it -- and
12 making pensions special, we now want to do something else.
13 We really want to say -- objectors thinks the Constitution --
14 that the convention -- that the conventioners really wanted
15 to say, well, in a municipality that has material pension
16 claims, they can't resort to a federal court to seek relief.
17 That's what they really want us to find in the pensions
18 clause. But, frankly --

19 THE COURT: No, no. I don't hear that at all. What
20 I hear is you are welcome to come in that door so long as the
21 city's assets, according to Mr. Dusen, are first allocated to
22 pensions.

23 MR. BENNETT: Well, if there was a lawyer around
24 there at the constitutional convention who was doing
25 research -- and I suspect that there was -- they should be

1 charged with figuring out that the only way to stop the
2 federal courts -- if there is even a way, but the only way to
3 stop federal courts from having the power to impair contracts
4 that maybe a state can't impair is to cut off the -- is to
5 basically say the state cannot ever go to a federal court for
6 a federal -- then it was called composition, you know,
7 federal debt composition case.

8 And the other point that your Honor should note is
9 that -- and we say this in our papers -- during the entire
10 constitutional convention, for years before and almost
11 continuously thereafter, the State of Michigan had authorized
12 the municipalities to file Chapter 9 cases, so if they were
13 really elevating pensions in the way of taking them --
14 distancing themselves from the federal power to impair them
15 and they knew, open paren, one, that the federal debt
16 composition scheme had been determined to be constitutional
17 by the Supreme Court in part because the federal court was
18 doing the work of impairing contracts and they knew -- they
19 have to be presumed to know that Michigan had opted in and
20 had continuously all through the period -- in fact, I think
21 in our papers we say when they repealed it. I think they
22 repealed it around 1980 when general authorization was all
23 that was necessary, so they kind of covered the entire
24 period. No one ever said, gee, we better as hell change
25 this. And in all of the legislative history of the

1 constitutional convention, you don't have a word about
2 bankruptcy and pensions, and the words that you do have --
3 the words that were quoted to you in the papers just filed --
4 I have to find it. Okay. Here's AFSCME's best quote from
5 the official record of the constitutional convention, 2
6 Official Record, page 3402. This is a new section that
7 requires that accrued financial benefits of each pension plan
8 and retirement system of the state and its political
9 subdivisions be a contractual obligation which cannot be
10 diminished or impaired by the action of its officials or
11 governing body. It's in AFSCME's papers, paragraph -- the
12 new ones, the supplemental papers. Actually, those are
13 amended and restated, paragraph 19, page 11. Same brief,
14 paragraph 142, page 71. Pension benefits constitute, quote,
15 "deferred compensation for work performed which should not be
16 diminished by the employing unit after the service has been
17 performed," close quote. Those are the quotes that you were
18 offered by AFSCME about the seriousness and importance of the
19 work done in the constitutional convention from 1961 to 1963,
20 this against the background where it's been the law of the
21 land, at least as far as the Supreme Court is concerned,
22 since 1930 -- I can't remember exactly.

23 THE COURT: So is it your view that the only
24 effective way that the Michigan Constitution could have
25 provided the protection for pensions that the objectors seek

1 here is by the Constitution prohibiting a Chapter 9 filing?

2 MR. BENNETT: Prohibiting authorization of a Chapter
3 9 filing or -- yes, your Honor. That's exactly what they
4 would have had to do, and that's not the kind of thing that
5 they can do by implication.

6 I want to talk a little bit more because I think
7 there's a lot of stress that's put on the words "diminished
8 or," and there is the assertion that "diminished or" has to
9 be given some meaning, but, frankly, the only meaning it
10 could be given is to somehow expand "impaired." I don't
11 personally think it does expand "impaired," and there's -- I
12 want to point out before moving on with a whole bunch of
13 authority to that effect that it's really dangerous for a
14 court to decide that "diminished or" added anything to
15 "impaired" because if the Court decides that "diminished or"
16 filled some gap that's related to the word "diminished and
17 impaired," then in the next case someone is going to come to
18 your Honor and say, "You know that state contracts clause?
19 There's no 'diminished' there, and 'impaired' has to mean
20 less than 'diminished or impaired' in the pensions clause."
21 So it's actually a good thing that there's law out there on
22 this subject -- we had it in our brief -- that basically says
23 that if you run into one of these problems where you've got a
24 list and you want to say that they all have an independent
25 and separate meaning, you've got to propose an independent

1 and separate meaning for the terms on the list that actually
2 solve the problem. And in this case, trying to find an extra
3 meaning for "diminished or" -- again, it's consistent with
4 its place in the sentence -- does -- creates a mess in the
5 state contracts clause in Article I, Section 10.

6 Apart from that, it turns out that when you go look
7 at the books -- and this is not in our papers because this
8 was an issue raised in the responsive papers -- is that every
9 time we found the definition of "impair" in the cases or in
10 dictionaries, it includes diminishment, which should not be
11 terribly surprising. It's a very common sense answer. But
12 if you want a list -- and you might need them in connection
13 with putting together an opinion -- you could start with the
14 Bank of Minden case, which is a Supreme Court case, 256 U.S.
15 126 at 128. Then if you want to go to the Sixth Circuit,
16 Riverview Health Institute, 601 Fed. 3d 505. Black's Law
17 Dictionary, Webster's Third, and then there's a bunch of
18 state courses -- state cases from other states that all say
19 the same thing. I could read the quotes, but I'll save the
20 time because it really is kind of a commonsensical -- a
21 common -- it's common sense that "impaired" has to include
22 "diminished." "Impaired" is much broader than "diminished,"
23 and every so often this is either a -- there's a rhetorical
24 flourish that works its way in, and this may well be what
25 that is, and that's all it can be.

1 Okay. Moving on to the issue of whether or not the
2 authorization to file Chapter 9 is ineffective because the
3 emergency manager or the governor recognized that impairment
4 of pension benefits may be necessary. I don't want to add
5 additional arguments to the constitutional provisions.
6 That's not the purpose of this section. The purpose of this
7 section is to deal with the point made, I think, by only one
8 or two of the objectors that the -- that there's an
9 instruction to the emergency manager to comply with the
10 pension statute, and that should apply to the filing of a
11 Chapter 9 case as well. I'm sure your Honor has your own
12 copy of the Local Financial Stability and Choice Act, Act
13 436, and when you look at the -- most importantly, when you
14 look at the Chapter 9 authorization section, there is no
15 instruction that the emergency manager comply with the
16 protections affecting pensions. By the way, that may well
17 make sense. There are a whole bunch of other provisions that
18 talk about what the emergency manager is supposed to do out
19 of court, and not surprisingly it talks about him having to
20 comply with many laws and to pay many debts and to do many
21 things. He resorts to Chapter 9 when he can't accomplish
22 those things out of court. And if one thought that anything
23 about the emergency manager law meant to say that the
24 emergency manager had to in Chapter 9 continue to not impair
25 pensions, you would think it would belong in the section that

1 is applicable when the emergency manager files Chapter 9.

2 In addition, I think the part that was read to your
3 Honor earlier this morning has a lead-in clause that didn't
4 make it into the record. It reads, "If the emergency manager
5 serves as sole trustee of the local pension board, all of the
6 following should apply," and that's where the provision that
7 was located was read to you, so there is nothing in the
8 emergency manager law -- and, in fact, the structure of the
9 emergency manager law itself suggests that a lot of bets are
10 off in a Chapter 9 context that may not be -- including
11 things that the emergency manager is supposed to try to
12 accomplish if he's in an out-of-court world.

13 Next argument, failing to condition authorization on
14 nonimpairment of --

15 THE COURT: One second. Does that suggest that in
16 order to accomplish what Mr. Orr thinks is necessary to
17 accomplish with regard to pensions, he needs to be a trustee
18 of the plan?

19 MR. BENNETT: No. It's that -- no. He has the
20 right to remove trustees of the plan for other purposes, and
21 these are these extra requirements that are imposed upon him
22 just in those circumstances that it -- I think when your
23 Honor gets a chance to look at it -- what did I do with it?
24 I had it here a second ago, so I'll give you -- let me give
25 the exact section referenced so it's easy to find.

1 THE COURT: Okay.

2 MR. BENNETT: The part I read from is in Section
3 12(m), and it is confined to that relatively narrow
4 circumstance.

5 Okay. First of all, on the issue of whether or not
6 the governor's failure to put conditions on authorization
7 makes the authorization invalid, we indicate in our brief
8 that we don't think that conditions on authorization could be
9 valid, that -- and as I think -- I think I got ahead of
10 myself earlier, so I don't want to take too much time in
11 covering it again now, but we're talking here about one of
12 the core subjects of bankruptcy, which is priorities, who
13 gets paid when there's not enough to go around. If that's
14 not a core subject of bankruptcy -- not in the core versus
15 related, but if that's not the absolute center of the subject
16 of bankruptcies, I don't know what it is. And we've cited a
17 lot of law, and your Honor has pointed out there are many
18 cases, none decided the other way, that say particularly in
19 the context of things touching on priorities and who gets
20 paid first and who gets paid second, who doesn't get paid at
21 all, that the -- that you buy the Bankruptcy Code as a whole.
22 You buy the scheme as a whole. You don't buy parts of it.
23 And in this sense federal law is supreme because once there
24 is a proper bankruptcy case before the Court, it is the
25 federal priority scheme that applies. It is legitimate that

1 the federal priority scheme applies because it's legislation
2 on the subject of bankruptcies, and because it's legislation
3 on the subject of bankruptcies, it is absolutely supreme,
4 period, end of story.

5 So, as to your Honor's hypothetical, if anyone walks
6 into the federal court and says, "I want federal judicial
7 relief. I want to use that federal power to untie and cut
8 knots, but I want the ultimate distribution or really any
9 part of the distribution to be conducted in accordance with
10 my terms," whether they're found in a statute or in a state
11 Constitution, it doesn't matter. The federal law on this
12 issue is supreme, and it's supreme over Constitutions and
13 over statutes, period, end of story.

14 It seems kind of small when done with that to point
15 out that 436 permits but doesn't require conditioning. We
16 can imagine a whole bunch of conditions that might have been
17 very sensible and that might not offend federal jurisdiction
18 like it could have been -- there could have been suggestions
19 or requirements as to exactly how the emergency manager
20 should interact with other elected representatives or with
21 other people. Actually, the governor does have one -- it's
22 not quite a condition. It's a suggestion, but I think he'd
23 be offended if it wasn't followed, which is he wants Mr. Orr
24 to continue to communicate with the governor and the
25 treasurer relating to what he's doing. So I think we can

1 think of several things that could be -- that you could use
2 for the PA 436 conditioning power that would be perfectly
3 okay, but going in and saying, "Gee, as a matter of this
4 particular state law" -- and, by the way, it's -- the
5 governor would -- to do that, he's got to ignore the
6 conflicts that I discussed earlier between a law that says
7 thou shall not impair this one with another law that says
8 you're the first money out. It's mind-boggling what he'd
9 have to reconcile, but the instruction would be, yeah, this
10 one we really meant and the others we didn't really mean,
11 follow that one first. I think that that would be an invalid
12 authorization. I think the Court would have to say that
13 authorization isn't okay for federal court purposes. I think
14 as a prudential matter, the federal court should not get
15 involved in a case where the authorization is conditioned in
16 a way that would offend the federal scheme, but understanding
17 that there may be very extreme and difficult circumstances
18 involved, a creative federal court might want to give people
19 some time to kind of take a couple steps back and figure out
20 how to do it better.

21 THE COURT: Let me ask about Section 943.

22 MR. BENNETT: I need to get a case if you're going
23 to do that because I -- from the --

24 THE COURT: This is the Bankruptcy Code.

25 MR. BENNETT: Yeah.

1 THE COURT: 943(b) (4) .

2 MR. BENNETT: Right. There's actually one case
3 that's dealt with that previously, and I think it's --

4 THE COURT: Let me just get my question out.

5 MR. BENNETT: Okay.

6 THE COURT: Thank you. So the question is what does
7 this section mean if it doesn't mean that the state can
8 dictate the priorities?

9 MR. BENNETT: Because it says "from taking any
10 action necessary to carry out the plan," and I --

11 THE COURT: What does that -- what does that
12 language mean? What meaning does it have? How does it come
13 into effect?

14 MR. BENNETT: Okay. I think the best way to work
15 through that is the Sanitary Improvement District Number 7
16 case, 98 B.R. 970, and this is a really fascinating case
17 because the facts gave you every conceivable issue under the
18 sun in terms of the interpretation of this section. What
19 happened in Sanitary Improvement District is that the debtor
20 had -- you know, had claims against it. Let's call them a
21 hundred. I'm using representative numbers, not the actual
22 numbers. As a result of the bankruptcy case, they issued
23 paper, and I think it was like 60. Okay. And the -- but the
24 paper that was 60 had in it a provision that said that if the
25 debtor paid it in full within a certain number -- within a

1 certain number of months -- I think it was 18 months -- after
2 the bankruptcy case is over, it only had to pay 95 cents on
3 the dollar or something like that, and so the creditors came
4 in, and they attacked the whole plan, pointed to a state law
5 that says thou shall pay your bonds. By the way, there are
6 laws like that in Michigan, too. And the court decides very
7 easily that the takedown from a hundred to 60, well, that's
8 supremacy clause bankruptcy. You can do that notwithstanding
9 state law. What you can't do, though, is because state law
10 says you have to pay bonds at a hundred percent of principal,
11 you can't have the five-percent discount feature because
12 that's -- after the bankruptcy, you issued this new bond, you
13 know, with 60 being the new hundred, but you've said that you
14 can still pay that off at a discount. That violates
15 943(b)(4). So what this case illustrates is that this looks
16 at the obligations after they've been restructured and says
17 that the Bankruptcy Court does the restructuring. By the
18 way, very consistent with the Cardozo and the Bekins view of
19 the world, you -- and you're finished. The bankruptcy --
20 there's a confirmation order. New instruments are issued.
21 Those instruments, the ones that you walk out of Bankruptcy
22 Court with, have to be instruments that you can perform in
23 accordance with state law.

24 THE COURT: So this provision, in your view, says
25 nothing about the requirement of the plan itself or the order

1 confirming plan to comply with state law.

2 MR. BENNETT: I don't know if there's any case that
3 says that. There may be. I think Sanitary and Improvement
4 District Number 7 has got it right, that it does not say
5 anything about the Bankruptcy Code restructuring process. It
6 only acts on the debt that is issued after the case is over.

7 I don't think I have to spend time on it, so I'm
8 going to skip over -- again, it's in our papers. There's an
9 assertion in the papers that the Tenth Amendment is not
10 reserved -- that the Tenth Amendment reserves every issue
11 relating to municipal pensions to the states. I think we've
12 dealt with that enough in the constitutional section, and I
13 don't have to deal with -- this really is the -- an argument
14 was built, constructed based upon the fact that in the case
15 of ERISA the federal government didn't make ERISA -- didn't
16 make states or municipalities applicable to ERISA, didn't
17 create the insurance program, PBGC, and the assertion is made
18 because the federal government chose not to go into those
19 areas, they must have done that because they were absolutely
20 precluded from doing so, ergo they are precluded from using
21 the bankruptcy power to modify pensions. I think that fails
22 logically in a lot of places, but most importantly maybe to
23 start with is that it's not clear that there is no possible
24 way for the federal government to apply the ERISA statute or
25 the PBG statute to state municipalities, maybe to states but

1 not to municipalities, and -- at all, by the way, and that
2 Congress didn't may have reflected political realities at the
3 time and not actual constitutional limitations, so I think
4 the starting point of that argument just fails, and I think
5 we've seen that federal -- that a federal bankruptcy power
6 can be applied by the federal court to obligations. Pensions
7 are clearly within the federal bankruptcy power, no dispute
8 in the private context. There's nothing different about
9 Chapter 9 context. And so there is no such part of the Tenth
10 Amendment that constrains this aspect of the subject of
11 bankruptcies.

12 The next point is a really important one, and I
13 could easily have started with it, and I know your Honor has
14 been concerned with it throughout, which is whether or not
15 your Honor really has to deal with the -- whether or not
16 pensions can be impaired in bankruptcy in the context of
17 authorization. I hope it's clear to your Honor that the city
18 is perfectly comfortable with you dealing with it now or
19 perfectly comfortable with dealing with it later. We don't
20 think that this is -- some of these things may be a little
21 bit conceptually difficult and complex, but the
22 constitutional law on the subject is really pretty clear, and
23 so we're prepared to have it decided. We think that there's
24 only one way to decide it. There is, though, a way for your
25 Honor to decide not to decide it, which is to find -- and the

1 next to the last sentence I read from Justice Cardozo in his
2 dissent where he says, "just the filing is not doing
3 anything," we say that, too. It is starting a bankruptcy
4 case. I have said at the beginning -- I mean it -- there is
5 nothing inevitable. A cramdown of revisions to pension
6 benefits, a cramdown of a particular treatment of the
7 underfunded portion of the pension obligation is not
8 necessarily the way this case is going to end, and it's not
9 necessarily the next step in this case. We just don't know.
10 The next -- obviously right now mediation is an important
11 milestone. The next important milestone is the plan, and
12 since your Honor has been around the Bankruptcy Courts for a
13 good long time, you know that the plan that we file before
14 the end of this year is not likely to be the plan that we
15 ultimately confirm. It would be actually a good exercise for
16 different people to figure which amended plan is going to be
17 the plan. The bottom line is nobody really knows. And so it
18 is possible to adopt Justice Cardozo's view that no change in
19 obligation results from the filing of a petition by one
20 seeking a discharge whether a public or private corporation
21 invokes the jurisdiction and basically say since nobody has
22 done anything yet, we're not going to decide anything more.
23 You could do that. I will say that the -- I think that the
24 assertion that there is an imminence that -- an imminence of
25 harm represented by the filing of the Chapter 9 case that

1 requires this Court to act is, frankly, not a fair statement
2 of the law. I think one of the more important cases is
3 Donohue. It's been cited by objectors. The most important
4 part -- Donohue is the Nassau County financial restructuring
5 case, and the most important part of Donohue that led the
6 Court to act I think is mentioned by the Court. It's kind of
7 near the end of the opinion. The Court says the law, the
8 ordinance that gave the county executive all the powers,
9 "provides expansive and seemingly limitless power to the
10 County Executive without any reasonable restraints other than
11 the procedural mechanism of an executive order." This case
12 would be a lot simpler if all Kevyn Orr had to do to
13 reorganize the debts of Detroit was to say how he wanted to
14 do it and sign it as an order. He doesn't think he has that
15 power. I don't think he has that power. No one in this room
16 thinks he has this power. We've talked about the fact that
17 to get to a debt adjustment plan that is nonconsensually
18 confirmed, it has to be filed. There has to be disclosure
19 statement approved. There has to be voting. There has to be
20 more discovery. There has to be a confirmation hearing, and
21 there has to be an order of this Court. That is a very
22 different procedure or array of protections than was
23 available in the Donohue case, which is, frankly, the closest
24 case to this one in terms of the kinds of things that we're
25 talking about here. If your Honor goes through the other

1 cases that have been cited for the proposition of imminent
2 harm, you will find that in all of them there was no judicial
3 step going to occur before the harm might be inflicted. In
4 all of --

5 THE COURT: Let me ask that question here. Can
6 you -- are you willing to identify here on the record or can
7 you identify here on the record any conceivable circumstance
8 in which retiree benefits, pensions won't be impaired by a
9 plan?

10 MR. BENNETT: You know, your Honor, at this point
11 there are a number of major things that I don't know, and I
12 will say I don't know that there won't be money from outside,
13 although I tend to doubt it. I don't know that. I do not
14 know whether there will be -- whether certain other assets
15 will, in fact, be available to the city to address its debts,
16 and I will point out in this regard that while the objectors
17 have cited over and over and over again a pleading filed by
18 the attorney general asserting the primacy of pension claims,
19 they've all managed to have forgotten a formal opinion he's
20 given concerning the accessibility of certain assets in this
21 bankruptcy case, particularly the art, and -- but I have no
22 idea, number one, what's going to happen with that, and I
23 have no idea what the -- whether or not there will, in fact,
24 be a transaction involving the departments of water and
25 sewerage and whether those transactions will deliver material

1 dollars. So while I'd be kidding myself and kidding the
2 Court and kidding everyone here if I said that I thought it
3 was anything but likely that there would be some impairment
4 of the underfunding claims in this case, it's not fair to ask
5 me and I don't think I could say that there's no scenario
6 where impairment will not be necessary. I just don't think I
7 can even say that today.

8 THE COURT: Okay. Even with that much of a
9 disclosure here, why isn't that enough to say there's an
10 impairment here?

11 MR. BENNETT: I'm sorry.

12 THE COURT: Why isn't that enough to say at this
13 point in time there's an impairment?

14 MR. BENNETT: Well --

15 THE COURT: There's a sufficient impairment to get
16 past ripeness anyway.

17 MR. BENNETT: You know, I don't think you can say
18 there's impairment because the Supreme Court has told us
19 there is not. There won't be impairment, your Honor, until
20 you say so. Is there a risk of impairment? There's a risk
21 of impairment. Is the risk of impairment enough to make this
22 ripe? And the answer is is that -- I think this is the
23 answer when -- I mean the Donohue case is a good example, but
24 I think it ripples through all the others, which is that if a
25 court is presented with a situation where there's a risk of

1 impairment and the impairment can occur before there's
2 another opportunity or requirement that people show up in
3 front of a judge, then they start thinking about whether
4 there's interim harm, but there's not a single case that has
5 been cited to you that says there is imminent harm in
6 circumstances where no one is going to suffer anything until
7 and unless a court enters an order after notice,
8 opportunities for discovery, opportunities for hearing, and
9 all the other protections that are available in connection
10 with a plan confirmation process in a Bankruptcy Court. It's
11 just totally different. The cases are dealing with a totally
12 different situation, particularly the Donohue case.

13 Do you have -- we're 20 minutes to.

14 THE COURT: Twenty till five.

15 MR. BENNETT: Do you want to save time for your
16 questions or --

17 THE COURT: If you want to stop now, and we'll pick
18 it up with the government's attorney, that's fine with me,
19 and then we'll pick up the balance of your argument tomorrow.
20 Is that what you're --

21 MR. BENNETT: I think it's a good break point.

22 THE COURT: Okay.

23 MR. BENNETT: I have very minor things left.

24 THE COURT: Good.

25 MR. TROY: Matthew Troy, your Honor, Department of

1 Justice, Civil Division, on behalf of the United States. If
2 it makes any difference to your Honor or the other parties, I
3 am here for tonight and can be available tomorrow as well.

4 THE COURT: I appreciate that, but since you're
5 here, let's have at it.

6 MR. TROY: Fair enough.

7 THE COURT: Well, my primary questions relate to how
8 you address the arguments here that the objecting parties
9 made in response to your brief regarding ripeness.

10 MR. TROY: To be honest with you, your Honor, I've
11 only reviewed those very quickly because I filed the brief on
12 Friday and then went back to furlough status. And on
13 Monday --

14 THE COURT: That.

15 MR. TROY: And on Monday --

16 THE COURT: Well, would it be your preference to
17 have overnight to think about how to respond to the
18 objectors' concerns regarding ripeness?

19 MR. TROY: Sure. I can do that.

20 THE COURT: Would that be your preference?

21 MR. TROY: That would be, yeah, a more fulsome
22 discussion, I think.

23 THE COURT: All right. Then you are excused, and I
24 will hear from you tomorrow regarding that. Do you want to
25 stop for the day now and pick it up tomorrow?

1 MR. BENNETT: Your pleasure, your Honor. I can keep
2 going, but I can also stop. I'm not going to -- I don't
3 have -- less than 30 minutes left, in fact, significantly
4 less than 30 minutes left.

5 THE COURT: Well, do you think you can finish in the
6 20 minutes that are left before five?

7 MR. BENNETT: I'll try.

8 THE COURT: All right. Then I would invite you to
9 try.

10 MR. BENNETT: Let me just get a little bit
11 reorganized. Okay. The next topic on my list is collateral
12 estoppel, and, your Honor, I think with respect to collateral
13 estoppel, a couple of points are worth focusing on. First of
14 all, our very, very first point on this -- and I think it's
15 dispositive -- is that when this case was filed, this Court
16 had the most exclusive jurisdiction it ever gets about
17 anything, absolutely exclusive interest -- exclusive
18 jurisdiction under 1334(a) to decide matters in the case, and
19 eligibility is a matter in the case. And the assertion by
20 the objectors is that the Webster court really didn't decide
21 eligibility. The Webster court was deciding some abstract
22 issues of state law. And, your Honor, two things. Number
23 one, the objectors can't even say that without mentioning the
24 eligibility determination, and here I'm looking at the
25 funds -- Mr. Gordon's brief at page 32. The Webster judgment

1 rules squarely on the constitutionality of PA 436 and the
2 governor's authorization of the emergency manager to proceed
3 under Chapter 9 in light of the pensions clause of the
4 Michigan Constitution. There was absolutely no confusion in
5 the judge's mind or anyone around that courtroom's mind that
6 what they were trying to do was to get an early determination
7 of eligibility. It might have succeeded, but this case was
8 actually filed first. And by the way, although the attorney
9 general will probably have more to say about this, there was
10 no adjournment sought for purposes of filing the Chapter 9
11 case, and the transcript shows no such thing. And they know
12 more about the circumstances than I do, and they can address
13 it tomorrow when it's their turn.

14 But there's an even more important point, which is
15 that the order that was entered by the judge purports to
16 enjoin the emergency manager directing him to have the case
17 dismissed and not file another one, so I just -- I can't
18 abide the assertion and the record does not support the
19 assertion that what happened in that court was not an effort
20 at an eligibility determination, so, number one, that was
21 within the exclusive jurisdiction of this Court. If it was
22 within the exclusive jurisdiction of this Court, it wasn't
23 within the jurisdiction of that Court to do anything about
24 it, and, therefore, any judgment that was entered after the
25 filing for that reason alone is void.

1 Now, second point we make is that the automatic stay
2 applied as well because the entire event, even though the
3 city was not a party, was an effort to gain control over the
4 city's assets and an effort to enhance collection of the
5 debt. Again, there can't be much dispute about that, open
6 paren, one, partly because of the way the whole proceeding
7 evolved and how everyone understood it, but more importantly,
8 here again we have the judge explicitly talking about the
9 Chapter 9 case and attempting to stop the Chapter 9 case
10 because of the perception that the Chapter 9 case might
11 impair pensions, and those kinds of acts are clearly within
12 the automatic stay. Again, I think that the --

13 THE COURT: Just to be clear, you're talking about
14 the automatic stay of Section 362 --

15 MR. BENNETT: Yes.

16 THE COURT: -- the Bankruptcy Code.

17 MR. BENNETT: Correct, the Bankruptcy Code's
18 automatic stay, or 942. The other half of it is in the -- is
19 in Chapter 9 as well.

20 Full and fair opportunity to litigate. Again, I
21 would ask the Court to look at the record in that case.
22 There had been -- it is certainly true that a whole bunch of
23 briefs that were filed -- I don't think the hearing where
24 this all occurred had previously been calendared and noticed
25 to anybody. The hearing was set on an emergency basis, and

1 someone got on the phone and called for the attorney
2 general's office because they thought it might be a good idea
3 to tell him about it about an hour before the hearing.
4 That's actually not the way things are fully and fairly
5 litigated in any courts I visit, and I don't think that when
6 your Honor ticks through the procedural elements of what
7 happened in that case in Lansing is going to be convinced
8 that there was a full and fair opportunity to litigate.

9 THE COURT: Let me ask you just a sort of
10 administrative question regarding this. Do we have in our
11 record here all of the pleadings and papers and dockets and
12 transcripts from that case?

13 MR. BENNETT: I don't know if they're there yet.

14 MS. NELSON: I believe I can answer that, your
15 Honor. Assistant Attorney General Margaret Nelson. It's my
16 understanding, no, those have not been submitted. I do have
17 all of the transcripts, which I was prepared to present to
18 the Court when I make my argument, which now appears to be
19 tomorrow. If the Court would like the submission of the
20 pleadings, we'll be happy to do that, although it's --

21 THE COURT: Well, my understanding is that some of
22 the pleadings have been attached to various briefs, but I'm
23 just not sure if it's everything.

24 MS. NELSON: There was only a -- there was --

25 THE COURT: Just to --

1 MR. BENNETT: We'll get it in.

2 THE COURT: Yeah, exactly. Just to be complete --

3 MS. NELSON: Yes.

4 THE COURT: -- let me make my request to you that
5 our record here include everything from that case, including
6 the docket.

7 MS. NELSON: There's three cases, your Honor.

8 THE COURT: Okay.

9 MS. NELSON: And so -- that were filed separately --

10 THE COURT: Well, but I think the --

11 MS. NELSON: -- so I will submit everything --

12 THE COURT: I think the one that's at issue here is
13 the one in which a judgment was entered.

14 MS. NELSON: Correct.

15 THE COURT: That's the one I need.

16 MS. NELSON: So you want everything in the case in
17 which the judgment was entered the next day, including the
18 docket entries.

19 THE COURT: Thank you.

20 MS. NELSON: Would you also like the Court of
21 Appeals materials --

22 THE COURT: Yes.

23 MS. NELSON: -- because the Court of Appeals
24 materials were --

25 THE COURT: Yes.

1 MS. NELSON: -- filed and a stay order entered
2 thereto?

3 THE COURT: Just for --

4 MS. NELSON: Webster?

5 THE COURT: For completeness, yeah. All right. I
6 have to -- I have to pause here. I've been advised that the
7 people in our overflow room couldn't hear this exchange, so I
8 will just restate it for the record. The attorney general's
9 representative has agreed to provide to the Court in this
10 case the complete record from the Webster litigation not only
11 at the trial court level but at the Court of Appeals level,
12 including all pleadings and papers, transcripts, and docket
13 entries, the docket itself. You may proceed, sir.

14 MR. BENNETT: Okay. Lastly, the last factor with
15 respect to collateral estoppel, your Honor, is the issue of
16 whether or not the judgment would be binding on the city in
17 any event. Of course, the city was not a party to those
18 proceedings. The assertion is made that the -- that there is
19 privity between the city and the state because they have a
20 common legal interest in some matters in connection with this
21 Chapter 9 case. Frankly, I don't think those are the same
22 standard, and I think we covered that in our papers, but I
23 will say one other thing is that to the extent that there --
24 that the plaintiffs in those cases believed that the city was
25 in privity with the state with respect to those cases is an

1 additional reason why the automatic stay applied from the
2 very beginning because if they thought that they were in a
3 case with the state really trying to bind the city, then it
4 is perfectly clear that they violated the automatic stay.

5 I don't think I have any other material topics that
6 I think we need to cover based upon the argument by others.
7 If I've missed something or if your Honor has any questions,
8 I'd be happy to take them. Otherwise I'll allow the attorney
9 general to take the floor tomorrow.

10 THE COURT: Um-hmm.

11 MR. BENNETT: We'll be done early.

12 THE COURT: Okay. Good. We'll be in recess now
13 until 10 a.m. tomorrow morning.

14 MS. NELSON: Your Honor, before you leave the bench,
15 may I just ask do you want those pleading -- do you want
16 everything submitted electronically?

17 THE COURT: Yes, yes, in the record of this case.
18 Thank you.

19 THE CLERK: All rise. Court is adjourned.

20 (Proceedings concluded at 4:51 p.m.)

INDEX

WITNESSES:

None

EXHIBITS:

None

I certify that the foregoing is a correct transcript from the sound recording of the proceedings in the above-entitled matter.

/s/ Lois Garrett

October 20, 2013

Lois Garrett